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JAN 19 1990

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In the Matter of: :

CABLE COPYRIGHT ROYALTY :

DOCKET NO. CRT 89-2-87CD

DISTRIBUTION PROCEEDINGS - :

PHASE II :

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(This volume contains pages 1094 through 1248)

Room 458
1111 20th Street, N.W.
Washington, D.C.

Thursday, January 18, 1990

The hearing in the above-entitled matter was
convened pursuant to Notice, at 10:00 a.m.

BEFORE:

J.C. ARGETSTINGER	Chairman
MARIO F. AGUERO	Commissioner
CTNDY DAUB	Commissioner

ROBERT CASSLER	General Counsel
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C O N T E N T SEXAMINATIONVOIRWITNESSDIRE DIR CROSS REDIR RECROSS CRT

Gloria Messinger

By Mr. Koenigsberg	--	1100	--	1173	--	--
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By Com. Agüero	--	--	--	--	--	1118
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Peter Boyle

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E X H I B I T SNUMBERFOR
IDENTIFICATIONIN
EVIDENCEBMI

XR-1 (Excerpt - Book)	1161	--
XR-2A (Handwritten list)	1207	1207
XR-2B (H&J cue sheets)	1207	1207
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P R O C E E D I N G S

(10:05 a.m.)

CHAIRMAN ARGETSTIGER: On the record. We will now begin the rebuttal phase of the Phase II 1987 Cable, which the parties are BMI and ASCAP. This morning, we will hear from ASCAP, presenting their rebuttal. Mr. Koenigsberg?

MR. KOENIGSBERG: Thank you, Mr. Chairman. I have a brief opening statement, and then we will begin with our first witness.

Mr. Chairman, Commissioner Aguero and Commissioner Daub, to continue Commissioner Aguero's metaphor, we're now about to hear the bell for the second round of this fight, the rebuttal phase and, as we do so, it seems to us that many issues have been sharpened, and our witnesses will address those issues as they rebut various portions of BMT's direct case, but we believe that the most important issue has been narrowed before the Tribunal and, indeed, it may well be that there's no real issue remaining at all. Let me explain that.

As you well know by now, we have said that the normal ASCAP distribution system and, we believe, the normal BMT distribution system, when applied to the music and the distant signals at issue here, produce approximately a two-thirds ASCAP/one-third BMT split.

Now, BMT, on the other hand, has advocated a new type of music use analysis, one that's based solely on the

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1 duration of musical performances on distant signals. And the
2 most significant fact, the most important fact, that you will
3 hear in our rebuttal case is that when BMI's errors in
4 tallying music use on their durational basis are corrected,
5 and when the methodological defects in their durational
6 analysis are repaired, the ASCAP-BMT split is more than 65
7 percent ASCAP and less than 35 percent BMT.

8 Dr. Boyle will prove to you that BMT's own
9 durational approach, when corrected, yields shares for ASCAP
10 and BMT that are comparable to the shares that would result,
11 or that do result, from the application of ASCAP's normal
12 royalty distribution system and to the shares which we
13 believe would result from the application of BMT's normal
14 royalty distribution system.

15 And, therefore, Commissioners, if the test here is
16 what is each organization's share of the actual performances
17 on distant signals in 1987 -- and we think that's the test,
18 and BMI seems to indicate that that's the test -- if that is
19 the test, then there is not much to argue about.

20 Now, of course, as has been repeatedly pointed out,
21 we must make as complete a record as possible for the
22 Tribunal, and so our witnesses are going to also address the
23 ancillary areas where the issues are sharply drawn.

24 BMT says that the Tribunal should look to the
25 licensing marketplace, and Ms. Hessinger will explain that

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1 the proper marketplace for the Tribunal to examine is not the
2 licensing marketplace, but the music royalty distribution
3 marketplace.

4 Ms. Messinger will show that in that music royalty
5 distribution marketplace, ASCAP and BMI do daily what the
6 Tribunal has to do here -- distribute a royalty fund -- and
7 they do so by using their normal distribution mechanisms.

8 Ms. Messinger will show that for the soundest of
9 reasons, both ASCAP and BMI weight different types of
10 performances differently, and she will show that to do
11 justice, the Tribunal should make its determination as if the
12 individual writers and publishers -- those that Commissioner
13 Aguero referred to -- that ASCAP and BMI represent, are
14 appearing before you.

15 Ms. Messinger will show that for whatever relevance
16 it has, the licensing marketplace is not as BMI has depicted
17 it.

18 Now, we have heard much from BMI about its so-
19 called "convergence" with ASCAP. We want to suggest to you
20 that the real convergence here is that of the bottom line
21 when the errors in BMI's durational approach are corrected.

22 ASCAP's share, using the music industry's normal
23 distribution machinery, is 67 percent or higher. ASCAP's
24 share using BMI's own durational approach, when the errors
25 are corrected, is more than 65 percent, and the convergence

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1 between those numbers, we suggest -- and we submit to you--
2 proves that the two-thirds/one-third division that we
3 advocate is correct, and is fair, and is just.

4 And with that said, Mr. Chairman, we will call Ms.
5 Messinger as our first witness.

6 CHAIRMAN ARGETSTINGER: Welcome back, Ms. Messinger.
7 Whereupon,

8 GLORIA MESSINGER
9 was called as a witness and, having first been duly sworn,
10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. KOENIGSBERG:

13 Q Would you state your name and position for the
14 record, please.

15 A I'm Gloria Messinger, and I'm the Managing Director
16 of ASCAP, American Society of Composers, Authors, and
17 Publishers.

18 MR. KOENIGSBERG: Mr. Chairman, Ms. Messinger's
19 background and qualifications were fully set forth in her
20 direct testimony and we need not repeat them here.

21 As you and BNT's counsel know, Mr. Chairman, we
22 submitted a corrected copy of our testimony, correcting
23 certain mathematical errors.

24 If you would turn to page 12 of Ms. Messinger's
25 testimony, you will find that those corrections are indicated

1 in that table. It turns out there was one other, of a very
2 minor nature, that we have to make, and that is three lines
3 above that table. You see the number "1508 Songs" in the
4 middle of the line. That number should be "1513".

5 BY MR. KOENIGSBERG:

6 Q Ms. Messinger, is that a correction that you wish
7 to make in your testimony?

8 A Yes, I do.

9 MR. KOENIGSBERG: And that having been said, Mr.
10 Chairman, the witness is available for voir dire.

11 MR. DUNCAN: I have no voir dire for Ms. Messinger.

12 BY MR. KOENIGSBERG:

13 Q Ms. Messinger, if you would, would you summarize
14 the main points of your rebuttal testimony for the Tribunal?

15 A Well, what I'm going to do is rebut the two
16 fundamental claims by BMT in their direct case, and those
17 are, first, that the Tribunal's determination as to how to
18 divide up the pot of money that has been paid by the cable
19 systems for retransmission of distant signals in 1987, should
20 be divided based on a comparison of license fees negotiated,
21 or license fees received by ASCAP and BMI; do it on that
22 comparison rather than a comparison of the relative share of
23 performances of the music performed in the repertoires of
24 ASCAP and BMT on distant signals in 1987.

25 Q In contrast to that claim, how do you think the

1 Tribunal should distribute the funds?

2 A I think the Tribunal should follow the way that is
3 out there -- that is, follow the way as closely as possible,
4 the way ASCAP and BMI does their normal weighting in
5 distributions and following their normal weighting systems.

6 Q And why is that?

7 A Well, ASCAP and BMI are here as conduits for the
8 writers and publishers they represent. And it's those whose
9 works are performed on the distant signals, who can make the
10 claims, and if they establish their claims they are entitled
11 to be paid.

12 So, you're really distributing, you're not
13 licensing.

14 Q You say that there were two claims of BMI that you
15 wish to rebut. What is the second one

16 A Well, the second claim is BMI's claim regarding
17 their local television rate, which they say underrepresents
18 the "true comparative value" of the BMI repertory. In fact,
19 I think that the rate that they receive overvalues the BMI
20 repertory.

21 The reason for that is -- I think we've spoken
22 about it to some extent in the direct testimony I gave -- and
23 that is, it's a package deal. BMI worked out an arrangement,
24 a deal, with the local television industry whereby stations
25 got certain concessions from BMI and BMI got higher fees.

1 Q Let's examine the first point you wish to rebut
2 then in detail, and turning then to your testimony at the
3 bottom of page 2, what is BMI's assertion that you wish to
4 rebut and how do you wish to rebut it?

5 A Well, BMI says what should be done here is, the
6 Tribunal's determination should be focused on the value of
7 the ASCAP and BMI repertoires in the market licensing area,
8 and we say that this is -- misses the point here. This is
9 not a rate proceeding; that the Tribunal is charged not with
10 setting or adjusting a rate, but it is charged with
11 distributing the funds that have been paid to the Copyright
12 Office, and the CRT has that requirement that it distribute
13 the money.

14 So, really, in brief, there is no licensing
15 question before the Tribunal.

16 Q Now, we know that the Tribunal has looked at the
17 marketplace factor in its prior decisions. In terms of that
18 marketplace factor, would you analogize music to other
19 claimants in the Cable Royalty Distribution Proceedings?

20 A No, I would not. The other claimants are very
21 different from ASCAP and BMI.

22 Q How so?

23 A Well, they don't have a common yardstick on which
24 to distribute funds -- they deal for themselves, the
25 licensing, representing themselves. There isn't this

1 mechanism in place which would permit the ready distribution
2 of funds.

3 Q And how do ASCAP and BMI then differ from those
4 individual entities?

5 A Well, they're collective organizations. They have
6 the daily matter, the responsibility of distribution
7 royalties to their members, and they face the same question
8 the Tribunal must face here -- how to distribute the money.

9 Q Now, you say -- well, let me ask you. Are the
10 ASCAP and BMI distribution mechanisms similar?

11 A They are similar in that we both rate performances,
12 we value performances. That is what we both do. We do it
13 somewhat differently, but we both do that.

14 Q Can you explain the similarities and the
15 differences, perhaps?

16 MR. DUNCAN: Excuse me, Mr. Chairman, may I ask
17 where the witness is in her testimony?

18 MR. KOENIGSBERG: Yes. The witness is at the top
19 of page 4, first full paragraph.

20 MR. DUNCAN: Thank you.

21 THE WITNESS: Well, they are similar in that we
22 both make distinctions the way performances are weighted.
23 And they are different in that ASCAP tallies both ASCAP and
24 non-ASCAP performances. It tallies and weights all
25 performances.

1 I believe BMT tallies, or starts to tally and
2 doesn't complete the processing of non-BMT performances. It
3 does not weight those non-BMT performances. So, they can't
4 tell, given a universe, how that money should be distributed.

5 BY MR. KOEHIGSBERG:

6 Q Do you think that we should engage in speculation
7 here as to the license fees, the license fees that would be
8 paid in the absence of a compulsory license?

9 A I don't think speculation gets you very far. If
10 you didn't have any other hard data to rely on, you might
11 look to it and try and figure out how money should be paid,
12 but here money has been paid. We know it's here. The
13 question is, how do you divide it up, and we now have hard
14 data which would permit us to divide the money up.

15 Q Can you explain why you disagree with BMI's notion
16 that the licensing marketplace should be used?

17 A Well, I disagree with it because, as I said, there
18 is hard data. The statute says very specifically that those
19 who can establish their claims, or that there were works
20 carried -- the past tense -- were actually carried or
21 performed, are those who should receive the money. So, I
22 think it clouds the issue, as it were.

23 Q And if that is the test to be applied, turning to
24 the top of page 5 of your testimony, how then should the
25 Tribunal apply it?

1 A Well, I think the Tribunal should look to see the
2 data, as to which works were performed and how they were
3 performed. I think the Tribunal should not try to reinvent
4 the wheel, but they should inquire as to how ASCAP and BMI
5 distribute royalties.

6 Each makes distinctions in the valuation of
7 different types of performances, and I think the Tribunal
8 should go down that route.

9 Q And as we are in a rebuttal phase again, how would
10 you contrast that approach with BMI's approach?

11 A Well, BMI's approach speculates as to license fees
12 that would be paid in a free marketplace licensing, and it
13 offers a durational survey constructed specifically for this
14 proceeding. It's entirely different from BMI's everyday way
15 of doing business of distributing royalties.

16 Q And what's wrong with that approach?

17 A Well, it ends up with BMI asking the Tribunal to
18 pay more money for performances of BMI music than for
19 comparable performances of ASCAP music, and it does so
20 whether you use the yardsticks that are normally applied by
21 ASCAP and BMI or this special yardstick that BMI has
22 constructed here, of a durational survey.

23 Q And what would be wrong with that?

24 A Well, a durational survey, we know from our
25 analysis, has errors, inaccuracies, methodological flaws--

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1 and Dr. Boyle will give you the details as to that -- and,
2 clearly, if you applied that, it would come down to the
3 ballpark that we are talking about.

4 Q And if you accept BMI's theory and claim that it's
5 entitled to half the royalties, would you think that the
6 result would be just or unjust?

7 A I think the result would be unjust. If you had
8 this pot of money, which we do have, and if you had only one
9 organization to distribute the money, ASCAP could do that,
10 and we'd have all the money and everybody would get their
11 appropriate share, both ASCAP members and non-ASCAP members,
12 but here we have two organizations representing writers and
13 publishers, and I wish writers and publishers could always
14 get the most money, but it would be unfair to pay ASCAP's
15 writers less because they would be getting half the money
16 with two-thirds of the performances.

17 It's elementary. If you divide two-thirds of the
18 performances into half the money, you're going to end up with
19 getting less than half of what you should get. In other
20 words, BMI will end up with one-third of the performances and
21 half the money, getting two times what ASCAP writers would
22 get.

23 And if you assume that both -- I'm talking here now
24 about a writer who is a collaborator, let's say, with an
25 ASCAP writer and a BMI writer collaborating, and they had the

1 same performance, on the same program, on the same distant
2 signal, given the fact that we each got half the money, that
3 one ASCAP writer would get significantly less and the BMI
4 writer would get two times more.

5 Q And, so, what is your conclusion that you would
6 advocate to the Tribunal on this rebuttal point?

7 A Well, I would say that the Tribunal should look not
8 to a licensing marketplace, but I should think they would
9 look to the actual performances of music on distant signals,
10 as ASCAP and BMI values them in the normal conduct of their
11 business, using everyday existing distribution systems.

12 Q And, so, the marketplace the Tribunal should look
13 to is which marketplace?

14 A It's the performance marketplace, not the licensing
15 marketplace.

16 Q Now, turning to the bottom of page 6 of your
17 testimony, Mr. Berenson's written direct testimony stated--
18 and I'll quote -- "Without control of program content, cable
19 operators have no reason to pay ASCAP more money than BMI. A
20 license for both repertoires is equally indispensable".

21 What do you think of that claim?

22 A Well, it's not what I think, or know, to be the
23 case of the real description of what goes on in the licensing
24 marketplace. It may be BMI's negotiating posture, and I give
25 them credit for it, but it's not reality.

1 In negotiation, music users do differentiate in the
2 value of the ASCAP and BMI music repertories, and they make
3 that distinction in the amounts they pay for licenses. Now,
4 sometimes a user may anticipate using music of ASCAP or BMI
5 in the future, and that will certainly be a significant
6 factor.

7 And one of the things we can look at is what our
8 experience has been with some users in the past, in some of
9 our negotiations.

10 Q Tell me, because I think we've gone past the point,
11 but tell me about your particular experience in negotiations.

12 A Well, my experience is that the user looks to see
13 what the performances have been of the music of ASCAP. They
14 often ask how it compares with BMI, our competitor. They
15 differentiate in the value of the ASCAP and the BMI
16 repertories, and they look at things such as the standards in
17 one repertory or another -- it depends upon how they want to
18 use, or how much they want to use it.

19 Q And then turning to the bottom of page 7 over to
20 the top of page 8 of your testimony, if -- and I underscore
21 the word "if" -- if the Tribunal were to consider the
22 hypothetical licensing marketplace, how, in your opinion,
23 should it do so?

24 A I think they should examine the use of music in
25 that marketplace.

1 Q Now, let's turn then to the second major point that
2 you wish to rebut. Can you state it for us again, please.

3 A Well, the point that BMT makes is that their
4 television -- local television -- license rate
5 underrepresents the true comparative value of BMI's
6 repertory. As I said before, I believe it overrepresents
7 that value.

8 Q And why does it overrepresent that value, turning
9 to page 9 of your testimony?

10 A Well, as we can see from the ASCAP Exhibit 17-X and
11 18-X and 29-R, there was a package deal worked out between
12 BMT and the local television industry.

13 Q Can you tell us what the nature of that package
14 deal was?

15 A I think I can, yes. Apparently, negotiations had
16 broken down between BMT and the local television industry.
17 There was a turmoil, if you will, going on. The local
18 television industry was concerned that BMT was getting too
19 aggressive and might send out license agreements because BMI
20 does not have a "determination" mechanism in place, for
21 determining a reasonable fee. It's a very different aspect
22 of BMT's life from ASCAP. ASCAP has a mechanism in place--
23 if the user does not feel ASCAP's fees are reasonable, it can
24 have its fees determined by a court. BMI does not have this
25 mechanism, and this has always been a threat, if you will,

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1 that they might have against the user, to turn off access to
2 the BMT repertory if they can't reach an agreement.

3 So, this was of primary importance to the local
4 television industry. In fact, one of the major exponents of
5 this concern said it was of supreme importance that there be
6 a mechanism in place similar to the one that ASCAP had.

7 So, part of the deal was that BMT was to go to the
8 Justice Department and seek a modification of their decree
9 and to seek a rate-determining mechanism similar to the one
10 that ASCAP has, and that was part of the deal.

11 Q What were the other parts of the deal?

12 A Well, when the negotiations were breaking down,
13 what happened was a local television broadcaster -- some BMI
14 stockholders were attempting to have a special board meeting
15 of the BMI convened --

16 MR. DUNCAN: Excuse me, Mr. Chairman. I apologize
17 to Ms. Messinger for interrupting. I note for the record
18 that I believe this testimony goes quite beyond what is in
19 her direct.

20 I'm not going to object, but I would like to note
21 for the record that she's going somewhat beyond her direct
22 testimony.

23 CHAIRMAN ARGETSTINGER: Mr. Koenigsberg, would you
24 comment on that?

25 MR. KOENIGSBERG: Yes, Mr. Chairman. I believe if

1 you take a look at Exhibit 29, on the point that Ms.
2 Messinger is testifying about right now, specifically on the
3 second page of Exhibit 29, which is, of course, part of her
4 direct testimony, you will see this point being made.

5 Perhaps we can continue, with Mr. Duncan's point
6 noted for the record, and my comment on it. Perhaps we could
7 continue with Ms. Messinger's testimony.

8 THE WITNESS: So, there was an effort on the part
9 of the local broadcasters and, as I said, certain
10 stockholders, to see that there was a tighter control by the
11 BMT Board, as pointed out in Exhibit 29-R, and --

12 BY MR. KOENIGSBERG:

13 Q Ms. Messinger, if I could interrupt you -- Chairman
14 Argetsinger and Commissioner Aguero sat in on the direct case
15 hearings, but Commissioner Daub did not. Perhaps a point
16 should be made clear then, as to who sits on the BMI Board of
17 Directors.

18 A Well, the BMT Board of Directors is made up of
19 broadcasters. They own BMT. ASCAP is a membership
20 association owned by the writers and publishers of ASCAP, and
21 its Board consists only of writers and publishers. So, we're
22 a very different structure, one organization from the other,
23 and so it was the BMI broadcasters, some of the dissidents,
24 if I may call them that, who were out to see that the BMT
25 Board was doing what it thought its job should be.

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1 In response, BMT filed an antitrust action against
2 the All Industry Music Licensing Committee, alleging that
3 they were trying to fix prices. So, you had a war, as it
4 were, going on between the two, and what finally happened
5 was, after, I believe, a New York State judge ruled that BMI
6 could not prevent this special stockholders' meeting that was
7 called by the dissidents, a deal was worked out -- a quid pro
8 quo, as it were.

9 They worked out a package deal whereby, as Mr.
10 Kramer, BMT's President at the time, put it, "Both sides gave
11 up something for something in return".

12 Q Where does that quote come from?

13 A That quote can be found on Exhibit 29-R, I think it
14 is -- if not, it's the one right before it.

15 Q Let's take a look at that Exhibit 29-R then. Where
16 are you reading from in that exhibit?

17 A I'm looking on the xerox, at the right-hand column,
18 and it's about the second large -- second paragraph there,
19 starting with "There was praise for the compromise from both
20 sides".

21 Q And, again, what was it that BMT's President, Mr.
22 Kramer, said?

23 A He said, in part, "Both sides gave up something for
24 something in return".

25 Q And there's a comment there by Mr. Aries,

1 identified as Chairman of the All Industry Committee. What
2 do you see as significant in his comment?

3 A He said that he was especially pleased with the
4 rate that was called for by the agreement. So, that was one
5 of the things that the local television broadcasters got BMI
6 to agree to, to go to the Department of Justice and see if
7 they could obtain such a mechanism similar to the one ASCAP
8 has.

9 Part of the deal also was that BMI said that they
10 would be bound by a program license similar to the one that
11 ASCAP had. They also said that they would -- BMI would
12 withdraw its antitrust action and, in return --

13 MR. DUNCAN: Mr. Chairman, again, with apologies--
14 and I do apologize to Ms. Messinger, I hate to interrupt -- I
15 don't find that in the Broadcasting article that she's
16 reading from, and I suggest that it goes beyond.

17 MR. KOENIGSBERG: Well, Mr. Chairman, it's also in
18 17-X and 18-X, which Ms. Messinger is the sponsoring witness
19 for here, and which is also part of her testimony.

20 MR. DUNCAN: Again, I'm not going to object, Mr.
21 Chairman. I just do want to note for the record that
22 sometimes my friend, Mr. Koenigsberg, insists on strict
23 adherence to direct testimony and the rules; other times he
24 seems to be less so. This might be one of those occasions--

25 CHAIRMAN ARGETSTINGER: You did make the reference,

1 and you said this is in 17-X?

2 MR. KOENIGSBERG: Seventeen-X and 18-X, which are
3 the documents that embody the settlement agreement between
4 BMT and the All Industry Committee and the parties--
5 broadcaster parties to that lawsuit.

6 COMMISSIONER AGUERO: Seventeen-X and which one?

7 MR. KOENIGSBERG: Eighteen-X. In 17-X, Mr.
8 Chairman, you'll find on the first page that there's an
9 agreement that BMT to offer a local television agreement and
10 the form attached; that BMT will withdraw its claims that the
11 parties -- on the next page -- that the parties will seek a
12 modification of the consent decree provisions to parallel
13 those contained in Article IX of the ASCAP consent decree,
14 which is also a matter of record in this proceeding; that in
15 paragraph 5, that there's an understanding regarding the
16 special meeting of stockholders to which Ms. Messinger has
17 testified; that on page 3, Article VI, there's a discussion
18 of the per program license agreement offer that's going to be
19 made, that goes on for some length of time. There you are.
20 I think that covers the points that Ms. Messinger --

21 CHAIRMAN ARGETSINGER: Thank you, Mr. Koenigsberg.
22 It is helpful when we know where the testimony is derived
23 from.

24 MR. KOENIGSBERG: Yes, sir.

25 THE WITNESS: And I guess the final thing was what

1 BMT got and what they did get was, of course, a phase-in, an
2 increase of their fees that they had been receiving -- they
3 had been receiving 58 percent of ASCAP's fees -- and they
4 ended up getting a commitment of 68 percent of ASCAP's
5 interim fees because ASCAP is still open with the local
6 television industry. This has been going on for some many
7 years now. So, they are going to get, and have been getting,
8 68 percent of ASCAP's interim fee.

9 BY MR. KOENIGSBERG:

10 Q And is it your testimony that that is the quid pro
11 quo, as you referred to it?

12 A Absolutely.

13 MR. KOENIGSBERG: Mr. Chairman, in the interest of
14 moving the proceeding along, Ms. Messinger's testimony
15 contains -- starting at page 10 -- some miscellaneous matters
16 that I dealt with, to make the record complete, and to rebut
17 certain claims by BMT. It's our feeling that we do not need
18 to pursue all of those matters on oral testimony, but we will
19 allow the written record to stand on them.

20 There is one, however, as to which Ms. Messinger
21 would like to testify orally, and that's the point beginning
22 on the bottom of page 11, concerning the RTAA certified Gold
23 record albums, and we can turn to that point now and, as I
24 say, move the proceedings along.

25 BY MR. KOENIGSBERG:

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1 Q Ms. Messinger, then turning to your testimony at
2 the bottom of page 11, would you tell us what claim it is of
3 BMI's that you are rebutting?

4 A Well, you will recall in the direct case Mr.
5 Berenson testified that BMT "licensed" 77 percent of the RTAA
6 certified Gold albums in 1987 and, of course, that means they
7 licensed over three-quarters of them.

8 As I recall, Commissioner Aguero asked that a tally
9 be made. So, I thought that would be an interesting task for
10 ASCAP to undertake, and I asked that a tally of the record
11 copy label be made, both as to ASCAP and BMI shares of songs
12 and as to the ASCAP and BMT shares of duration.

13 Q As I recall, Commissioner Aguero asked a number of
14 songs. Why did you include the duration?

15 A Well, BMI has placed great emphasis on duration in
16 this case, and I thought that the duration approach of BMI
17 would be interesting to apply to the Gold albums, so that's
18 why we did undertake that.

19 Q And turning to the table on page 12, what results
20 did you find?

21 A Well, when we analyzed these, we found that as to
22 the songs, ASCAP had 56.9 percent of the songs and, as to the
23 duration, ASCAP had 58.4 percent.

24 MR. KORHITSBERG: Mr. Chairman, that concludes Ms.
25 Messinger's oral testimony, and we will make the witness

1 available for examination by the Tribunal and for cross-
2 examination.

3 CHATMAN ARGETSTINGER: Commissioner, do you have
4 any questions?

5 COMMISSIONER AGUERO: Yes, maybe one or two
6 questions.

7 EXAMINATION BY THE TRIBUNAL

8 BY COMMISSIONER AGUERO:

9 Q Good morning, Ms. Messinger.

10 A Good morning.

11 Q Going to your page 2, you said "Contrary to BMI's
12 local television licensing rate was part of a package deal
13 with the station that concession from BMI and, in return,
14 agreed to pay higher fees. Is there anything, this license
15 rate, over BMI's relative share for local television
16 performance".

17 Do you think the Tribunal should take into
18 consideration for the allocation, the concession, if any,
19 that BMT gave to obtain higher rates or higher fees?

20 A I think it does give you the background as to why
21 these rates were obtained. I think it's not a measure of the
22 relative value of the BMT repertory, but there are other
23 factors at work here.

24 Q Also, do you think the Tribunal, in this
25 determination to not take into consideration the comparison

1 of the license fees in 1987, in Exhibit B-1 and B-2?

2 A That's the local -- you're talking about the
3 library?

4 Q Uh-huh.

5 A I think they have a very modest value here because
6 you're not talking about setting a rate, you're talking about
7 distributing money, and the way you should be distributing
8 money is to those whose works were performed. I think that's
9 what's unique about this proceeding, compared to any others
10 that I understand have been had in this whole world of cable
11 retransmission.

12 Q Evidently, you don't touch -- on your page 7 -- the
13 Muzak music in doctors' offices, and lawyers, and physicians,
14 and dentists. According to your testimony, ASCAP owns all
15 the Muzak business, with 75 percent, and BMI only 25 percent.

16 Why do you mention in your testimony the Muzak,
17 given that Mr. Koenigsberg doesn't touch that issue? Do you
18 think we should give some weight?

19 A I think it's -- you know, it's an interesting fact.
20 If you're going to look at the marketplace, I think you have
21 to -- as to licensing, this would be a fact you might like to
22 know, but I frankly think that you should be focusing not on
23 the licensing marketplace, but on the distribution
24 marketplace.

25 Q Also, in page 11, for example, BMI offered an ASCAP

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1 publisher member a guarantee of \$200,000 a year, to be an
2 affiliate of BMI, even said that TV music wouldn't make it a
3 part of ASCAP or BMI.

4 In those years, were these all provided -- was by
5 BMI -- I mean, is the system of pre-monitored plays for the
6 person, for the baseball player, the basketball player, exist
7 in this country since we were born. Isn't it a wrongdoing by
8 BMI to offer a contract to a person who has a contract with
9 ASCAP or vice-versa?

10 A I don't think it's a wrongdoing in that sense. I
11 think there is a competition out there, and that's part of
12 the American system, but I think when you're paying money,
13 you like to get full value for it. I don't think BMI got
14 full value for it. They did claim to have a lot of works in
15 their repertory because of this. So, I think \$200,000, in
16 those days, was a lot of money.

17 Q What year was it, Ms. Messinger, do you have any
18 idea?

19 A I think we're talking about 1939-1940, thereabouts.
20 It was a long time ago.

21 Q In the miscellaneous matter, you reference BMI has
22 represented history -- even, Mr. Koenigsberg, you don't talk
23 races also. Why do you describe so beautifully the mistakes
24 in reference to the history of BMI?

25 A Well, I think there's a lot of dust that gets

1 thrown up about the founding of BMT, and I think it should be
2 put on the record in a way that sets forth the facts, and I
3 think it is a detour for this Tribunal, frankly, but once it
4 was put in the record by BMT, it was my responsibility to set
5 the record straight.

6 COMMISSIONER AGUIERO: Thank you very much. I have
7 no other questions.

8 CHAIRMAN ARGETSINGER: Commissioner, do you have
9 any questions at this time?

10 COMMISSIONER DAUB: Not having sat in on the direct
11 case, I'm not familiar enough with the case to ask any
12 questions.

13 BY CHAIRMAN ARGETSINGER:

14 Q Ms. Messinger, you're saying this is a different
15 distribution than the Tribunal has been involved in in the
16 past, or at least different than the normal distribution.

17 A That's correct.

18 Q You're suggesting then -- and I gather I can draw
19 the conclusion -- that the product, each unit of the product
20 is of equal value? We're not making comparisons?

21 A I'm sorry, would you say that again?

22 Q We're not making a comparison of value. You're
23 saying the product is all the same.

24 A Well, I wouldn't say the product is all the same.

25 I say if you put all the product together, ASCAP could

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1 determine what each writer and publisher should get, based on
2 a normal distribution system. It would be incorrect to
3 divide it --

4 Q Each unit?

5 A Each --

6 Q Each unit -- in many distribution proceedings, we
7 have a situation where there is local broadcasting versus
8 films, or religious broadcasting versus another type of
9 production, and in those situations we attempt to come to a
10 value judgment of the value.

11 Are you saying for each unit, that the product is
12 the same?

13 A I'm not quite sure if I understand what you mean by
14 each unit.

15 Q Are you suggesting that we don't have to make a
16 determination as to whether one minute of ASCAP music is
17 superior or less than the value of one minute of BMI?

18 A I am suggesting that. I'm suggesting that there is
19 a distribution system in place, which ASCAP and BMI are the
20 conduits for, that they -- if you were to award a sum of
21 money to ASCAP, to reflect their share of the performances,
22 ASCAP, in turn, would see that it was distributed to our
23 members.

24 CHATMAN ARGETSTINGER: Thank you.

25 Mr. Duncan?

1 MR. DUNCAN: Thank you.

2 CROSS-EXAMINATION

3 BY MR. DUNCAN:

4 Q Ms. Messinger, before I start, just for the record
5 -- oh, I'm sorry -- good morning, again.

6 A Good morning, again.

7 Q Your Exhibit 29, from which you've testified, is,
8 in fact, an article from the trade press, is it not?

9 A Yes, it is.

10 Q A newspaper article?

11 A That's correct.

12 Q And, also, to be sure that I understand, at the
13 bottom of page 4, you say that the statute tells us that the
14 royalties already paid should be distributed to the copyright
15 owners who establish claims that their works were carried on
16 non-network distant signals in 1987, and you cite 117 U.S.C.
17 111(d)(3).

18 Just so that I'm sure I understand you, could you
19 tell me where in the statute it says that?

20 MR. KOENIGSBERG: It would be in this one because
21 that one is amended. (Handing document)

22 THE WITNESS: (Perusing document) May I read (3)?
23 It says "The royalty fees thus deposited shall, in accordance
24 with procedures provided by clause (4), be distributed to
25 those among the following copyright whose claim that their

1 works were the subject of secondary transmission by cable
2 systems during the relevant semiannual period".

3 BY MR. DUNCAN:

4 Q And that's what your testimony refers to?

5 A That's right.

6 Q Thank you. Now, if I might invite your attention
7 to page 1 of your testimony, down towards the bottom, you say
8 "Contrary to BMI's claim, I believe that the Tribunal should
9 distribute the Cable Royalty Fund as closely as possible to
10 the way ASCAP and BMI would use their normal weighting
11 systems".

12 You are advocating, I would assume, using the ASCAP
13 system as opposed to the BMI system, is that correct?

14 A Well, I'm advocating the Survey of Performances
15 based on the four approaches that we put forward in our
16 direct case.

17 Q But you say here "using their normal weighting
18 systems". I assume you were referring to the ASCAP system
19 that it normally uses for distribution purposes, not the
20 surveys -- not the four surveys that were introduced in this
21 proceeding, is that correct?

22 A No, that's not correct. I'm relating one to the
23 other. I'm contrasting it to the BMI Durational Survey.
24 That's not BMI's normal weighting distribution survey.

25 Q Well, when you say "using their normal weighting

1 systems", just tell me what you are referring to, please.

2 A I'm talking about the normal way ASCAP and BMT
3 survey and distribute their royalties. In this case, we're
4 applying it not because we don't normally survey and
5 distribute in the particular fashion that we're talking about
6 here.

7 We have looked at various approaches and how we
8 think it would be helpful for the Tribunal to take the Survey
9 of Performances and take these approaches and come up with
10 numbers. And I don't mean showing ASCAP's share at between
11 67 and 72 percent.

12 Q When you say, again, in the same sentence, ASCAP
13 using its normal weighting system, you're referring to the
14 ASCAP use of performance credits, are you not?

15 A That's part of the ASCAP --

16 Q That would certainly be part of the ASCAP --

17 A -- the valuation that ASCAP uses and the valuation
18 that BMT uses.

19 Q All right. And is it your testimony that in that
20 sentence, the way ASCAP and BMI would, using their normal
21 weighting systems, you're referring to the ASCAP Distribution
22 Survey which you conduct every year as well as the four
23 surveys included in your direct case? Is that what you're
24 saying?

25 A That's correct.

1 Q All right. And what comparable for ASCAP would you
2 be saying?

3 A I'm sorry -- would you say that again, Charlie?

4 Q I'm sorry -- for BMI. What is the comparable
5 system for BMI that you would be referring to?

6 A Well, for BMI, in their normal matter, they would
7 use their distribution survey which weights the performances,
8 but they didn't choose to do so here. They chose to
9 construct a new approach, and not to rely on their normal
10 approach. As I understand it, they are using a durational
11 time mechanism here.

12 Q So, by normal weighting systems, at least as it
13 refers to ASCAP, you are referring to the annual ASCAP
14 Distribution Survey as well as the four surveys prepared by
15 Dr. Boyle, is that correct?

16 A Which is part of the approach. That normal survey
17 is part of the approaches that we've used in every one of
18 these four methodologies, if you will, that Dr. Boyle
19 testified about on direct.

20 Q Now, Ms. Messinger, you don't normally, for
21 distribution purposes, use Larson weights and Nielsen
22 weights, do you?

23 A No, we don't normally do that.

24 Q And in distributing to your affiliates, you don't
25 normally use or refer to the kind of statistical studies that

1 Dr. Boyle presented in his four surveys prepared for this
2 proceeding, do you?

3 A When you say -- you're referring -- well, why don't
4 you tell me what you are referring to.

5 Q I'm referring to -- what are the exhibit numbers--
6 in ASCAP's direct case, Exhibits 6, 7, 10, 11 and 12, the
7 four surveys.

8 A The four surveys, okay.

9 Q You don't normally -- in distributing to your
10 affiliates, you don't use those surveys, do you?

11 A No, we don't normally use those surveys, but we
12 have here a subset. We're dealing with a subset of a local
13 television survey. We're dealing with very specific uses on
14 very specific stations which are distant signals that are
15 being picked up by cable systems. You've got a different
16 world here.

17 We're trying to be helpful to the Tribunal and show
18 what approaches would be used, and could be used, by the
19 Tribunal.

20 Q But am I incorrect in assuming that ASCAP's normal
21 weighting system is based on the annual surveys and the
22 performance credits, the weighting formulas and the
23 distribution that you make to your members, is that fair to
24 say?

25 A Our normal -- as you call it, normal weighting

1 system where we value performances -- and different
2 performances get valued differently.

3 Q But it's not normal, as I call it -- I'm using your
4 words -- using their normal weighting system?

5 A Right. That's the valuation of performances
6 differently. That's the basis for the ASCAP and BMI
7 distribution to its members.

8 Q And unless I'm mistaken, that doesn't include the
9 four surveys that were prepared for this proceeding, does it?

10 A It doesn't include Nielsen data and Larson data.

11 Q Thank you. Inviting your attention to page 3, up
12 at the top of the page, you say here the "Tribunal is not
13 charged with setting or adjusting the cable compulsory
14 license rate. The rate has been set, the fees have been
15 paid, and music's total share has been determined. No
16 licensing question is presented".

17 And over on page 4, at the beginning of the second
18 full paragraph, you say "In this distribution proceeding, the
19 Tribunal's task is to distribute the royalties already paid
20 by cable operators".

21 With reference to that question -- and this has
22 been touched on by Commissioner Aguero but, with the
23 Tribunal's permission, I would like to go into it in a little
24 more detail.

25 In your view, what should the Tribunal consider in

1 distributing the Royalty Fund in this proceeding?

2 A I think the Tribunal should consider how the ASCAP
3 and BMI normally do distribute royalties. And when they do
4 that, and you apply the various methodologies that Dr. Boyle
5 has testified to, it would determine that ASCAP should
6 receive anywhere from 67 to 72 percent of the money.

7 And then, as I said before, if you were to give a
8 50-50 split here, it would certainly underpay ASCAP's writers
9 and publishers and overcompensate BMI's writer and publisher
10 affiliates.

11 Q Is that all that the Tribunal should consider, the
12 normal distribution formulas of the two organizations?

13 A As Dr. Boyle testified, they should think of the
14 methodologies that he has offered here as a way of doing it.
15 It's a combination of factors.

16 Q Anything else?

17 A No, I think that's basically it.

18 Q So, therefore, the Tribunal should not consider
19 market factors in an effort to simulate market valuation?

20 A Not when you have hard data. If you didn't have
21 hard data, I think you could speculate about the impact of
22 what license fees might be if you were dealing in a free
23 marketplace and ASCAP and BMI were out there negotiating for
24 a rate, but this is not the case here.

25 Q And the Tribunal, accordingly, should not consider

1 that the compulsory license was established to compensate for
2 a perceived deficiency in the unregulated market?

3 A A compulsory license was, in fact, established.
4 You are dealing with the reality here. The reality here is
5 that there was a fee established, and people were obliged to
6 pay a certain amount of money, and there is now a sum of
7 money setting to be divided, to be distributed to writers and
8 publishers whose works were, in fact, performed in 1987. We
9 are now in 1990.

10 Q And the Tribunal should not consider that in our
11 economic system, resources are most fairly and efficiently
12 allocated by a market system?

13 A In the world that we are dealing with here -- we
14 are not dealing in a free marketplace -- we are dealing with
15 a sum of money that was arrived at and put into place by the
16 will of the United States Government.

17 Q By the will of the government?

18 A Well, Congress, if you will.

19 Q Congress.

20 A Yes. I think of them as part of the government.

21 (Laughter.)

22 CHAIRMAN ARGETSINGER: And the President signed the
23 bill.

24 (Laughter.)

25 BY MR. DUNCAN:

1 Q And it would follow, from what you've said, that
2 the Tribunal should not consider that the rate that cable
3 systems pay under the compulsory license, is not a true
4 reflection of the direct marketplace value of the musical
5 works in question?

6 A Well, I think if this were a cable rate proceeding,
7 that would be an appropriate approach, but I think for better
8 or for worse, there is -- a rate has been established, and we
9 have got to deal now with the distribution of the money.

10 Q My question is, in your view, the Tribunal should
11 not consider the fact that the compulsory rate is not a true
12 reflection of the marketplace.

13 A I, frankly, don't know whether the rate is or is
14 not a true reflection of the marketplace. I mean, we could
15 debate whether it is or isn't and we could speculate on what
16 it should be, but I think we have to deal with what we've
17 got, and what we've got is money to be distributed.

18 Q Is it fair to say that your answer is the
19 compulsory rate may or may not be reflective of the
20 marketplace?

21 A It may or may not be, I don't know.

22 Q And the Tribunal should not consider, under your
23 view, the benefit of a particular type of distant signal
24 program to a given cable operator?

25 A Well, I really think we're talking here about

1 certain distant signals are more valuable than others,
2 certainly, and that's part of the testimony that's been
3 presented here. And I think Dr. Boyle has testified to that
4 fact, and if I'm wrong, he will certainly correct me. So, I
5 think you do have to make a distinction as to the value of
6 different signals, and you have to make distinctions as to
7 the kind of performances that occurred on those distant
8 signals, and you have to see what the uses were, and I think
9 if you were talking about in a real marketplace, you would
10 have to value different performances differently, just as
11 users do, in my experience, value different performances
12 differently.

13 Q But you're saying that because there is a
14 compulsory rate in effect, this Tribunal should not take any
15 of those factors into account?

16 A I think what the Tribunal's responsibility here is,
17 is to distribute money. I think, you know, we can engage in
18 an academic discussion, what I view as academic, as to
19 whether it is appropriate or whether it isn't appropriate,
20 whether it's enough, how it was arrived at. That's not what
21 we're dealing with here. We're dealing with distributing the
22 money.

23 Q Well, I'm not going to pass judgment on whether
24 it's academic or not. I'm trying to find out for record
25 purposes what, in your view, in ASCAP's view, the Tribunal is

1 entitled to or ought to consider, and so far you have given
2 your view.

3 Should the Tribunal consider the cable operators do
4 not obtain distant signal programming on a program-by-program
5 basis?

6 A I, frankly, think it's irrelevant for this
7 proceeding that we're now involved in.

8 Q Is it irrelevant that cable operators must take, or
9 do take, the distant signal for which they pay through the
10 compulsory license, as it is, or take it not at all?

11 A That is what the -- it's their choice whether they
12 take it or not, as I understand it, and then certain events
13 take over from there, and they have to pay a fee for the use
14 of the signals.

15 Q So, it's your position that absent a compulsory
16 license, the cable marketplace that would exist is not
17 relevant. Is that your position?

18 A No. I beg you pardon -- absent a compulsory
19 license?

20 Q Yes.

21 A If there was no compulsory license, you would have
22 to be -- if you were licensing the ASCAP or BMI repertory,
23 you would certainly have to consider what was happening in
24 the marketplace, and one of the major considerations is, what
25 the use of the ASCAP music would be, the extent of it, the

1 kind of music. Those are factors that would be considered in
2 establishing the rate.

3 Q Let's pursue that if we could, your proposition.
4 If there were not a compulsory license --

5 A I think it's your proposition, Mr. Duncan.

6 Q All right, accept it as my proposition. If there
7 were not a compulsory license, what factors would be taken
8 into account in a negotiation for an ASCAP license with a
9 cable operator, in your view?

10 A Well, I think you would have to -- though, frankly,
11 I find this to be an academic discussion at this point -- you
12 would have to consider the use that would be made by the
13 cable operator, of the ASCAP repertory.

14 Q The use that -- say that again?

15 A The cable operator would make of the ASCAP
16 repertory, as it appears on distant signal.

17 Q By use that would be made -- what do you mean,
18 beyond whether he showed the program or didn't show it?

19 A The performance of the music, which occurs in the
20 course of transmitting the program.

21 Q In a negotiation with a cable operator, absent a
22 license, would you take into account the operator's need to
23 have the ASCAP license -- need in the sense that in order to
24 have access to a fair representation of music, he would have
25 to have the ASCAP license?

1 A Well, I think anyone who uses copyrighted music
2 must have the permission of the copyright owners, and they
3 either go to ASCAP or they go to our members, and a large
4 user would prefer, in most cases, to deal with ASCAP.

5 Q But my question is, in a free market negotiation,
6 absent the compulsory license, would the cable operator's
7 need to have an ASCAP license be something that would be
8 negotiated about -- whether you need this license?

9 A He would have to have, or she would have to have,
10 the permission of the copyright owner. ASCAP is representing
11 the copyright owners, its members. So, it would deal with
12 ASCAP in order to obtain permission. In that sense, they
13 would certainly need a license, yes.

14 Q And the same would be true, would it not, with
15 respect to a BMI license?

16 A If they were performing music in the BMI repertory,
17 they certainly would want the security because they can't--
18 in a free marketplace, they couldn't go to the court and have
19 the court establish a rate. BMI could withhold their
20 repertory unless they reached a deal.

21 Q In a negotiation with a cable operator, either in
22 your own experience or what you have seen or observed -- if
23 you were negotiating a license, an ASCAP license, with a
24 cable operator, absent the compulsory license, would you
25 negotiate about the ASCAP distribution system?

1 A T would negotiate about ASCAP's share of the
2 performances of the music used by the cable operator --

3 Q No, I didn't ask that.

4 A -- and that would be a reflection of the ASCAP
5 survey, the ASCAP weighting of performances. Yes, it would
6 certainly be a relevant consideration.

7 Q Would you negotiate about different uses for theme,
8 and background, and feature music, with a cable operator?

9 A It depends. Sometimes. You wouldn't specifically
10 negotiate the individual items, but it would be a very large
11 question of what kind of music were they going to use. For
12 example, if you were going to negotiate with Turner for WTBS,
13 I would think the fact that much of the film music used by
14 Turner that's in the ASCAP repertory, would be a very
15 important consideration certainly for Turner.

16 Q But question is, in negotiating with our
17 hypothetical cable operator, would you say so much of the
18 rate is allocable to theme music, and so much to background
19 music, and so much to feature music?

20 A No. Almost never do you get into those specifics.

21 Q Would the degree of control that the cable operator
22 would get with respect to his distant signal in terms of what
23 programs were carried, would that be something that would be
24 a negotiable item?

25 A No, I don't think that's an issue, the fact is that

1 they use a repertory or they don't use a repertory, whether
2 they initiate the performance or they pick it up from another
3 source, the fact is that they are, in fact, performing, and
4 they are therefor using, and that's the fact of life, just as
5 you have in the case of a radio station and you have
6 performances of a radio over speakers in a large supermarket.
7 The fact that there is one performance by the radio station
8 and performances in a supermarket, they are two different
9 performances, and each has the responsibility for paying for
10 their own use.

11 Q In this hypothetical negotiation absent the
12 compulsory license, would you, as negotiator on behalf of
13 ASCAP, look to other analogies?

14 A I would look to see what use is being made of the
15 ASCAP repertory. That is what would be paramount here.

16 Q And how would you do that?

17 A From time to time, you might -- actually, there
18 isn't -- no, I would pretty much stick with how they are
19 using the repertory.

20 Q Would you look to agreements with networks and
21 local television stations?

22 A No, I don't think I would. I don't see that as a
23 major factor here. It's how each individual user or music
24 use is --

25 Q And you disagree with Dr. Boyle on that point, I

1 assume?

2 A I don't know what Dr. Boyle said on that point,
3 frankly.

4 Q In response to a question put back on page 655 of
5 the transcript in this proceeding, the question put by
6 Chairman Argetsinger -- the question was "Dr. Boyle, let me
7 try to replicate what the marketplace would do, a difficult
8 task, but suppose there were no compulsory license. How
9 would you go about licensing the cable system, a blanket
10 license?"

11 Now, I'm skipping pages, over to page 657, and he
12 says, or at least the transcript says --

13 MR. KOENIGSBERG: Just a moment, Charlie, before
14 you continue. When you're skipping the pages, you're also
15 skipping some intermediate questions that Chairman
16 Argetsinger asked Dr. Boyle.

17 BY MR. DUNCAN:

18 Q Well, let's go back to page 655, which is part of
19 the first answer he gives. "Well, we would look to other
20 analogies, I'm sure, if we were dealing with just the distant
21 signal market".

22 A little later -- and I am skipping, and if it's
23 relevant, I'll read the whole thing.

24 MR. KOENIGSBERG: Well -- excuse me -- he says
25 that, and he continues, "Actually, let me take a step back"

1 he says, "if that kind of change took place", and then he
2 continues with a further elaboration. The record says what
3 it says. Obviously, it's a matter of excerpting it for this
4 purpose, and it should be accurate.

5 BY MR. DUNCAN:

6 Q Do you have any recollection of Dr. Boyle's
7 testimony that he would look at, in a negotiation under these
8 circumstances --

9 A As I said, I don't have a recollection of Dr.
10 Boyle's testimony.

11 Q All right. Now, we've talked about what the
12 Tribunal should consider in allocating the fund, and we've
13 talked about some of the things that would take place in a
14 negotiation with a cable system absent the compulsory
15 license, and I'll try to do this as briefly as I can.

16 What considerations do performing rights
17 organizations take into account in distributing revenues to
18 its members and affiliates?

19 A They take into consideration the various uses of
20 music in their repertory, and they value different
21 performances differently. We share that basic philosophy,
22 ASCAP and BMT does.

23 Q Anything else?

24 A Well, if you give me specifics, I might be able to
25 answer that.

1 Q All right. Would you agree that we established in
2 your direct testimony and cross-examination, that in applying
3 the ASCAP weighting formulas, that some subjective judgments
4 enter into assigning weights?

5 A In that different performances are valued
6 differently.

7 Q And would you not agree you've already testified
8 that in assigning weights and in constructing the
9 distribution system, internal business considerations are
10 taken into account?

11 A To some extent, yes.

12 Q In fact, you so testified, did you not?

13 A Yes.

14 Q And would you not agree that in determining the
15 distribution system, the weights are sometimes set to attract
16 new members?

17 A I don't think the weights are set particularly to
18 attract new members. We do have competitive considerations at
19 heart, but the thing you have to remember, Mr. Duncan, about
20 the ASCAP distribution approach is that we tally ASCAP and
21 non-ASCAP, and those tallies are blind. So, it isn't that
22 we're favoring ASCAP music in the ASCAP survey, as opposed to
23 non-ASCAP music. It's all being tallied, so you can
24 establish what particular group of people who happen to be
25 ASCAP members as opposed to those who are not ASCAP members,

1 would receive under exactly the same rules. It isn't that
2 once you've applied the rules, people are being treated
3 differently. They are all being treated the same.

4 Q In 1987, Ms. Messinger, isn't it a fact that your
5 weighting rules were amended to double the credit given to
6 theme music, from 10 percent to 20 percent?

7 A There was an increase. I don't remember exactly
8 when.

9 Q And what that done, in part, to attract a certain
10 kind of writer, a certain kind of songwriter?

11 A It was done, in part, to value -- we looked at it
12 and said that it was important to keep some of our members as
13 well as to attract others.

14 Q So, it's a question of member attraction or member
15 retention, however you wish to put it. And isn't it also a
16 fact that in an earlier year, with respect to the writers of
17 certain gospel music, that you tripled the rate paid for that
18 kind of song, for the purpose of attracting writers of that
19 kind of song?

20 A Well, that was a slightly different thing. That
21 was not the reason for that. That was because it was very
22 difficult to survey that kind of music, much of it being
23 public domain related music and so on, and coming out of
24 anthems and different things, that that credit was given to
25 those writers.

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1 Q And it's your testimony that it was not done to
2 attract members?

3 A I don't remember it being that, frankly; I don't
4 remember that at all.

5 Q All right. And, of course, the ASCAP distribution
6 system is amended and adjusted from time to time, to satisfy
7 ASCAP's perception of what is fair and equitable distribution
8 among its members?

9 A But you see, when you get all fish, you're dealing
10 with the universe of performances, and we tally ASCAP and
11 non-ASCAP, and they are weighted uniformly, they are weighted
12 even-handedly, and you can ascertain what a given group of
13 writers and publishers would get as opposed to another group.

14 Q Dr. Messinger, unless -- forgive me -- Ms.
15 Messinger --

16 (Laughter.)

17 No, I've been called Dr. Duncan and I've called you
18 Dr. Messinger.

19 Unless I'm misunderstanding you completely, we're
20 not talking about ASCAP and non-ASCAP members. I'm asking
21 you a question about ASCAP's distribution system to its own
22 members.

23 And my question to you with respect to distribution
24 to its own members is, is not the ASCAP formula, the ASCAP
25 system, the ASCAP weighting rules, amended and changed from

1 time to time in order to ensure justice and fairness among
2 ASCAP members?

3 A Absolutely.

4 Q Thank you.

5 Mr. Chairman, I'm about to go into a new area.
6 Would this be an appropriate time for a short recess?

7 CHAIRMAN ARGETSINGER: Yes, we'll take a five-
8 minute recess.

9 (Whereupon, a short recess was taken.)

10 CHAIRMAN ARGETSINGER: Mr. Duncan, do you wish to
11 proceed?

12 MR. DUNCAN: Thank you, Mr. Chairman.

13 BY MR. DUNCAN:

14 Q Ms. Messinger, on page 4 of your testimony, in the
15 first full paragraph, you say "The ASCAP system, after all,
16 tallies and weights all performances, ASCAP and non-ASCAP
17 alike". Is there any way that the Tribunal could verify that
18 statement?

19 A Well, I think the answer is, you have to take a
20 look at the entire ASCAP and BMI system, but this is what has
21 been taking place for umpteen years and this is what has been
22 used in our distribution of royalties to our members.

23 Q I'm not talking about the BMI system, I'm talking
24 about the ASCAP system. You say that the ASCAP system
25 tallies and weights all performances, ASCAP and non-ASCAP

1 alike. My question is, can that be verified?

2 A Well, let me shed some light on that, Mr. Duncan.
3 ASCAP tallies all performances -- features, themes -- any
4 kind of performance, both ASCAP and non-ASCAP. There was a
5 time when ASCAP did not tally durational performances of
6 music that was not in the ASCAP repertory, which never had a
7 history of feature performances or any other performances.

8 So, simple background music -- I use the word
9 "simple" in that sense, not that it's simplistic -- but
10 simple background music which was not in the ASCAP repertory
11 prior to 1980, we did not tally.

12 Q Beyond your testimony, which I'm not challenging
13 because you're giving it -- I'm asking a derivative question.
14 Is there any way that the Tribunal could verify the fact that
15 ASCAP, in fact, tallies and weights all performances?

16 A Well, they could come up and observe how we do
17 things but, short of that, I think it would be difficult.

18 Q All right. Thank you.

19 COMMISSSTONER AGUERO: We have to observe in what
20 way? You mean we have to go up to ASCAP's office and
21 observe?

22 THE WITNESS: Well, you could, if you wanted to be
23 100 percent certain that we do what we say we do.

24 CHATRMAN ARGETSIUGER: But it is your testimony
25 that you do this?

1 THE WITNESS: Yes, we do do it, with the slight
2 variation that I've said where we didn't, for a period of
3 time, tally certain background music, non-member music.

4 CHAIRMAN ARGETSINGER: Thank you.

5 COMMISSSTONER AGUERO: On this page, page number 4,
6 you said "I would urge the Tribunal to rely on our system",
7 but we don't know the system you have.

8 THE WITNESS: But if I may suggest, I think you do
9 know. There has been much testimony about our system, and
10 the system is the one that is used by ASCAP, and it certainly
11 is used -- a similar system is used by BMI -- to distribute
12 billions of dollars, not only to ASCAP's members but to
13 foreign societies. So, you have a mechanism in place which
14 values performances. I think that is the thing you have to
15 consider.

16 I think to say that everyone is perfect and never
17 makes a mistake -- I wouldn't suggest that, but this is the
18 way billions of dollars have been distributed.

19 CHAIRMAN ARGETSINGER: Well, how do we know that
20 BMI uses a similar system?

21 THE WITNESS: Well, you have BMI's exhibit which is
22 their payment schedule.

23 COMMISSSTONER AGUERO: This is the ASCAP Exhibit 24
24 that you referred to?

25 THE WITNESS: That's correct. You see that they do

1 value performances in different fashion, just as ASCAP values
2 performances in different fashion. It's a basic structure
3 that's similar. There are differences between the two but,
4 as I said before, the ASCAP system offers the opportunity of
5 tallying ASCAP and non-ASCAP music, so you can take the
6 universe and see the relative performance share of ASCAP and
7 non-ASCAP music.

8 CHAIRMAN ARGETSTINGER: Is this Exhibit 24-X, is
9 that the document we should look to, to determine what the
10 BMT system is?

11 THE WITNESS: Well, I think it purports to be the
12 BMT system. It does say that they add payments quarterly, as
13 they see they need to, and I think it would be a question to
14 ask a BMT witness but, as I understand it, that is their
15 basic payment document.

16 BY MR. DUNCAN:

17 Q You say in the same line that ASCAP's, after all,
18 tallies and weights all performances, ASCAP and non-ASCAP
19 alike. May I assume from that that you weight BMT
20 performances?

21 A Yes, we do.

22 Q And what considerations do you take into account
23 when you weight BMT performances?

24 A We don't take any considerations into account in
25 that it is a blind application of the rules to the music that

1 comes in, and there is no distinction made.

2 As I said, certainly, since 1980 forward, there's
3 been no distinction made as to non-member music even when it
4 comes to just the simple background music, but all
5 performances are treated alike by the ASCAP system.

6 Q So, if I understand you then, you weight non-ASCAP,
7 BMT music, if you will, by the ASCAP weighting system?

8 A That's correct.

9 Q And that would include the history of past
10 performances of ASCAP music, as required by your weighting
11 formula?

12 A Yes, that's correct.

13 Q And how long have you been keeping past performance
14 history on BMT songs?

15 A Since time immemorial.

16 Q Well, when was that?

17 (Laughter.)

18 MR. KOENIGSBERG: Mr. Chairman, excuse me for a
19 moment. I think Mr. Duncan asked Ms. Messinger if weighted
20 it based on the history of past performances of ASCAP music,
21 and then you just said the history of past performances of
22 BMT music. I assume the first question -- that's what you
23 said, Charlie.

24 MR. DUNCAN: I said -- I think I said what I meant
25 to say -- namely, you weight ASCAP music according to the BMT

1 system -- I mean, according to ASCAP -- let me start again.

2 You weight BMI music, non-ASCAP music, in
3 accordance with the ASCAP system.

4 MR. KOENTIGSBERG: It was the next question after
5 that then.

6 THE WITNESS: All performances are tallied and
7 weighted, without regard to whether they are ASCAP or non-
8 ASCAP. Only the payment, when you get to pay them do you
9 make a distinction as to whether it's ASCAP-represented music
10 or non-ASCAP music.

11 CHAIRMAN ARGETSINGER: But they are weighted
12 according to the ASCAP formula?

13 THE WITNESS: Yes, because we're dealing with --

14 BY MR. DUNCAN:

15 Q In order to weight non-ASCAP music, you would need
16 to have some performance history of non-ASCAP music, would
17 you not?

18 A That's correct.

19 Q And it was this question --

20 MR. KOENTIGSBERG: Yes. You didn't say it that way,
21 but that's the way I

22 BY MR. DUNCAN:

23 Q My question is, how long have you been keeping
24 performance history information on non-ASCAP music?

25 A As far as I know, certainly since we've had

1 computers, in the early '50s-'60s, if not earlier, that we
2 were tallying performances.

3 Q The performance history is an interesting part of
4 your system. Could you be more specific as to when you began
5 to keep records as to the prior performances of non-ASCAP
6 music?

7 A I can't really be more specific. I would say it
8 was really almost from the beginning, from the very
9 beginning, we started to keep tallies of performances of non-
10 ASCAP music.

11 Q Excuse me -- from the beginning of what, Ms.
12 Messinger? I'm just asking --

13 A Yes. I wish I could tell you. I would say we
14 started to pay publishers and foreign societies in the '30s,
15 and BMI wasn't formed until '39-'40. I would think, really,
16 we started to pick up in our survey, non-ASCAP music from the
17 word "go".

18 Q Would it be your testimony that you kept
19 performance history on BMI music from the time BMI was
20 formed?

21 A Yes, if it appeared in the ASCAP survey, I
22 certainly would. That's the best I understand it. Subject
23 to correction, that's what I understand. It was before my
24 time.

25 Q The past performance history of all this music, I

1 assume, appears in your computer somewhere, is that right?

2 A Basically, it does appear in the computer.

3 Q May I invite your attention, please, to page 7 of
4 your testimony, the first full paragraph. You testify in
5 negotiations, music users differentiate in the values of the
6 ASCAP and BMI repertories and in the amounts they pay for
7 licenses. Is that your testimony?

8 A Yes.

9 Q Ms. Messinger, I would like to read to you
10 questions and answers put by Chairman Argetsinger and answers
11 by Dr. Boyle back on December 15th, the earlier phase of
12 this.

13 "Q I suppose cable systems would say, 'Look, we
14 really don't have any control, not like broadcasters.
15 We don't know what's coming our way. We don't know
16 whether we're going to have a lot of BMI music or
17 whether we're going to have a lot of ASCAP music. We
18 just don't know.' How would you go about setting a fair
19 fee?

20 "A You know, I'm not sure that --

21 "Q I assume you're probably going to tell me just
22 like in your study, this would dovetail nicely with your
23 case.

24 "A I'm not sure broadcasters always know in
25 advance, or have that much control, in music, either

1 when they buy syndicated program packages or when they
2 buy packages that were previously produced and run for
3 the networks. That's one of the beauties of the blanket
4 license, is that when you are able to reach agreements
5 with television stations, local television stations, or
6 cable systems. They have the right to use any music, as
7 many times as they want, for a fee that we hopefully
8 have agreed upon as being reasonable. So, whether a
9 program has a lot of ASCAP music, little ASCAP music,
10 isn't going to be a big concern for them. They are
11 removed from whatever copyright liabilities they have.
12 They have paid the fee for the right to access, the
13 right to broadcast any and all works in the repertory as
14 much as they want."

15 If you would like to take a minute to read that
16 because my simple question is, do you agree or disagree with
17 that. (Handing document)

18 A (Perusing document) Yes.

19 Q Do you agree or disagree with that?

20 A Well, I'd agree with Dr. Boyle's statement. I
21 think I would amplify it and say that I think when you are
22 negotiating with a user, they do take into consideration what
23 their prior use of music has been, what they do need. The
24 beauty of a blanket license is that it gives total access,
25 but I think when you sit down to negotiate with a past track

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1 record, there certainly is a question of what kind of music
2 is being used and how much of it is a factor.

3 Q On the second page, Ms. Messinger, and going back
4 to the bottom of page 6 and the top of page 7, you say that a
5 license for both repertories is equally indispensable,
6 quoting Marvin Berenson.

7 You go on to say, "Based on my experience in
8 negotiations with all major user industries over more than a
9 decade, and my knowledge of the license fees negotiated by
10 ASCAP and RMT, I can say that BMI's claim may be a
11 description of BMI's negotiating posture, but it is not a
12 description of the reality of the licensing marketplace".

13 I invite your attention to our Exhibit 23, which is
14 the so-called Dollinger opinion. If you don't have a copy of
15 that, may I give it to you?

16 MR. KOENIGSBERG: Mr. Chairman, I think I have an
17 objection at this point, to the reference to BMI's Exhibit
18 23. That exhibit is not yet in the record because BMI has
19 not yet presented its rebuttal case.

20 If Mr. Duncan wants to cross-examine Ms. Messinger
21 on that decision, that certainly is his right, but it is just
22 the characterization of the decision. Why don't we simply
23 refer to the decision as such, without characterizing it as a
24 RMT exhibit.

25 MR. DUNCAN: That's a fair observation.

1 BY MR. DUNCAN:

2 Q I will show you a document under a tab which is
3 numbered 23, and it's several pages long, and I will ask you
4 if you can identify that rather lengthy document.

5 A It's 72 pages, of several pages long. Yes, I can
6 identify it.

7 Q And would you just very briefly tell the Tribunal
8 what it is.

9 A It appears to be what is called the Redacted
10 Memorandum and Order in the Application of Showtime and Movie
11 Channel for a licensing order. It's a pay cable operation.

12 Q And that was the proceeding before the so-called
13 rate court, was it not -- ASCAP rate court?

14 A Yes.

15 Q And Dollinger is who? He's a magistrate, a federal
16 magistrate in the Southern District of New York?

17 A Yes.

18 Q I'd like to read just a short question from that,
19 please.

20 A Is there a copy around that I could follow along
21 with?

22 MR. KOENIGSBERG: Yes. (Handing document)

23 BY MR. DUNCAN:

24 Q On page 46, Ms. Hessinger, I'd like to read the
25 first paragraph, first full sentence, starting at line 2.

1 "Since a reasoned valuation of the ASCAP and BMI licenses
2 suggests that their value to the cable company does not
3 greatly differ, as we noted, both are plainly necessary for
4 the current operations of the cable program suppliers. It is
5 reasonable to infer that the ratios reflecting a nearly one-
6 on-one relationship between ASCAP and BMI are better
7 indicators of equivalent bargaining leverage between licensor
8 and licensee, and that the right cited by ASCAP" -- well, I
9 don't need to read that sentence.

10 Now, if you would drop down to the footnote, the
11 last sentence in the footnote. "In any event, for our
12 purposes, it need only be observed that the difference in
13 fees has not been shown on the present record, to reflect any
14 meaningful economic distinction between the two licenses, or
15 any difference in the license fees evaluation of the benefits
16 of those licenses."

17 Do you agree or disagree with those conclusions by
18 Magistrate Dollinger?

19 A I disagree. That decision is on appeal.

20 Q If it were affirmed, that wouldn't make you agree
21 with it, would it?

22 (Laughter.)

23 A There is a supreme court.

24 (Laughter.)

25 It wouldn't be the first time that decisions have

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1 been lost in a district court by ASCAP and BMI, and --

2 Q That wasn't my question. You said you didn't agree
3 with it because it was on appeal, and I asked --

4 CHAIRMAN ARGETSINGER: I thought the parties always
5 agreed with decisions of courts and Tribunals.

6 (Laughter.)

7 BY MR. DUNCAN:

8 Q If you would go to page 9 of your testimony, first
9 full paragraph. You refer to ASCAP Exhibits 17-X and 18-X,
10 the facts as shown by those exhibits are that BMI and the
11 local television broadcasters made a package deal, and you
12 testified on direct examination at some length, about the so-
13 called -- what you've characterized as a package deal.

14 Just for the record, you were not a party to those
15 negotiations, were you?

16 A No, I was not.

17 Q And I would assume that you have no personal
18 knowledge of what took place in those negotiations.

19 A I was not present.

20 Q Do you have any personal knowledge of what took
21 place in those negotiations?

22 A Just what I've read and heard.

23 Q So, therefore, you don't know of your own personal
24 knowledge, what the various factors that went into the
25 settlement are, do you?

1 A Just what I've testified to. I don't have any
2 personal knowledge other than what I've read and what I've
3 heard.

4 Q So, you don't know of your own personal knowledge,
5 whether or not it was clear, as you've testified -- this is
6 further down on your page 9 -- you don't know of your own
7 personal knowledge, that BMI received a higher license fee
8 than it would have received had it not dismissed the
9 antitrust suit and agreed to seek a modification of its
10 consent decree? You don't know that, do you?

11 A I think it's a very reasonable inference from all
12 that I have read, including the agreement worked out between
13 --

14 Q But you don't know that, do you?

15 A Well, I know what I read, and I think it's a fair
16 assumption.

17 Q Is it possible that one of the things that BMI gave
18 up was a higher fee than the one that it negotiated?

19 A I find that hard to believe.

20 Q My question was, is that a possibility?

21 A Mr. Duncan, anything is possible.

22 Q And since you don't know, that could very well have
23 been the case, might it not have?

24 A It strains reason.

25 Q It strains whose reason?

1 A A reasonable person's reason.

2 Q Or does it strain your reason?

3 A Mine as a reasonable person, certainly.

4 Q And you mentioned seeking a rate court similar to
5 the one ASCAP has in your testimony, do you remember that?

6 A Yes, I do.

7 Q Is the ASCAP rate court advantageous to ASCAP?

8 A I don't think it's advantageous to ASCAP in that
9 sense. It's a very complicated mechanism. I think what it
10 does do is, it gives comfort to a user because they have the
11 opportunity of having an outside body determine -- a court
12 determine a reasonable fee if they disagree with ASCAP.

13 Q Wouldn't it give the same comfort to ASCAP?

14 A It is what it is. It's part of the way we live.

15 Q Well, put another way, if you can't come to a
16 license agreement under the provisions of the decree and the
17 order, you always have the option of going to the rate court
18 to have your fee set, do you not?

19 A We have the opportunity of asking that the court
20 set a fee.

21 Q So that is, in a sense, a bargaining chip that you
22 have in your negotiating sessions, is it not?

23 A It's a rather limited bargaining chip. I wouldn't
24 call it a bargaining chip.

25 Q What would you call it?

1 A I'd just say it is part of our procedure that if we
2 want to be sure that -- well, let me put it another way. We
3 cannot withhold our repertory from any user. We must give
4 total access to our repertory. There's nothing we can do to
5 prevent somebody from using it. We can't go into court and
6 get an injunction against them. They have an absolute right
7 to use it, and they have that right until fees are
8 determined, either as an interim matter or as a final matter.

9 Q But the fact is, if you cannot arrive voluntarily
10 at a license fee, at least those that are covered, you can
11 always go to court and ask the court to set a fee?

12 A We can certainly ask the court to set a fee, and
13 the user can ask the court to set the fee.

14 Q Right. And it's your testimony that that's neither
15 advantageous nor disadvantageous to ASCAP?

16 A I think there are pros and cons to having that kind
17 of system, but it is one that's part of our consent decree,
18 and that's what it is.

19 MR. DUNCAN: Your indulgence, please?

20 (Off the record)

21 BY MR. DUNCAN:

22 Q Well, one of the things that the rate court does
23 is, it permits you to get a higher fee on an interim basis,
24 does it not?

25 A What do you mean by a higher fee on an interim

1 basis?

2 Q Well, to get a fee set by the court on an interim
3 basis.

4 A Yes, it gives that opportunity because, after all,
5 they have the absolute right to use the repertory, so they
6 should pay for it.

7 Q If a rate court were established for BMI, as you
8 alluded in your testimony, would not the same pros and cons
9 apply?

10 A That would be up to BMI. I would assume that the
11 same pros and cons would apply.

12 Q Now, if you would go to page 11 of your testimony,
13 the middle of the second full paragraph. BMI raided the
14 ASCAP membership and tried to induce some publisher members
15 to license their works through BMI.

16 Isn't it a historical fact, Ms. Messinger, that in
17 the view of some people, ASCAP had membership practices which
18 were considered restrictive -- I'm talking the early days now
19 -- and that people who would like to get into ASCAP had
20 difficult doing so? Is that not an historical fact?

21 A The fact is that prior to 1941, ASCAP had a
22 requirement that you had to have five regularly published
23 works in order to become a member. It was a much more
24 "professional" organization. That was prior to '41. In '41,
25 our consent decree required that we take anyone who had at

1 least one work published.

2 Q That was one of several membership requirements,
3 was it not?

4 A I don't remember anymore than that.

5 Q Didn't the work have to be in vogue?

6 A Vogue means just a work regularly published, Mr.
7 Duncan. There's nothing exotic about the word "vogue".

8 Q Would it be fair to conclude that given the various
9 qualifications for ASCAP membership, that the ASCAP Board
10 could pretty well determine who was and was not a member?

11 A To the extent that it could determine whether a
12 person had five works regularly published or not, they made
13 the determination as to the meeting of those qualifications.
14 I suppose you could say that, like any other organization.

15 Q Would you disagree with the proposition that the
16 ASCAP organization, through its Board, could admit or keep
17 out whoever it wanted to?

18 A That's a long time ago, and I must say, I don't
19 know. I suppose that a recourse someone would have would be
20 to bring a lawsuit against ASCAP in those days. I don't know
21 whether anyone did or not, frankly.

22 MR. DUNCAN: Could I have this marked for
23 identification as BMJ Cross-Examination Rebuttal Exhibit XR-
24 1, please?

25 MR. KOENIGSBERG: Could we go off the record for a

1 second?

2 CHAIRMAN ARGETSINGER: Yes.

3 (Discussion off the record.)

4 (Whereupon, the document was
5 marked for identification as
6 Exhibit No. BMI XR-1)

7 MR. KOENIGSBERG: Before this is accepted into
8 evidence, Mr. Chairman, first of all, it is not a complete
9 copy of whatever it is. Secondly, there is no knowledge of
10 who this person is, what this document is, any endorsement
11 that this document might have. I would object to its
12 introduction on those bases.

13 MR. DUNCAN: Mr. Chairman, I haven't yet tried to
14 authenticate it.

15 MR. KOENIGSBERG: Well, I would object on the basis
16 that it is not complete.

17 MR. DUNCAN: Well, insofar as completeness is
18 concerned, the Tribunal's own rules provide if you only seek
19 to put in part of a document, you only can put in the part
20 that you're going to have marked as evidence. You don't have
21 to put in the whole document.

22 If Mr. Koenigsberg would like us to submit the
23 whole document, we'd be more than glad to do that.

24 MR. KOENIGSBERG: I'd like to see a copy of the
25 whole document.

1 MR. DUNCAN: (Handing document)

2 BY MR. DUNCAN:

3 Q Ms. Messinger, I'd like to show you for
4 informational purposes, the entire book from which that
5 chapter is taken. I would ask you if you've ever seen that
6 work before?

7 A No, I have not.

8 Q You never have. Have you ever heard of John Ryan?

9 A No, I have not.

10 Q Are you aware that that document or that book
11 exists?

12 A Well, I see it in my hand, so it does exist.

13 (Laughter.)

14 Q No, my question is a serious question. Are you
15 aware, whether you've seen it or not, that there is a work by
16 that title, which you may not have seen or read -- had you
17 ever heard it discussed, let me put it that way.

18 A No, I have not.

19 MR. DUNCAN: May I ask Mr. Koenigsberg if he would
20 object to the receipt of this document in evidence?

21 MR. KOENIGSBERG: Yes, I would. I don't know who
22 Mr. Ryan is, I can't cross-examine him. I haven't even
23 examined the whole document. I would object to the receipt
24 of the document in evidence.

25 MR. DUNCAN: Then I assume that Mr. Koenigsberg

1 would not object to my reading a short passage from the
2 document because that is consistent with what was done when
3 he tried to introduce a book with Dr. Black. I made a
4 similar objection, and he was able to read from it even
5 though not introduce the document into evidence.

6 MR. KOENIGSBERG: As I recall, I read something to
7 Dr. Black and asked him if he agreed or disagreed --

8 MR. DUNCAN: That's exactly what I would propose to
9 do.

10 MR. KOENIGSBERG: -- and that I would have no
11 objection to.

12 MR. DUNCAN: Thank you.

13 BY MR. DUNCAN:

14 Q I'd like to read two paragraphs -- just for
15 identification purposes, it's a document entitled The
16 Production of Culture in the Music Industry, subtitle The
17 ASCAP-BMT Controversy. The author is John Ryan. The
18 copyright page shows it was copyrighted in 1985, by the
19 University Press of America, Inc.

20 MR. KOENIGSBERG: Mr. Chairman, you will recall--
21 Mr. Duncan has alluded to my cross-examination of Dr. Black.
22 You will recall, on my cross-examination of Dr. Black, I
23 didn't make any attempt because it would have been wrong, to
24 attest to who or what or where the document was. I simply
25 read the excerpt and asked if he agreed or disagreed, and

1 that is what I'm not objecting to here, but I will object to
2 anything further than that.

3 MR. DUNCAN: I will accept that. I was only doing
4 it for identification purposes, as, indeed, Mr. Koenigsberg
5 did because he identified the author of that work as being a
6 professor --

7 CHAIRMAN ARGETSINGER: So, you're not attempting to
8 offer this into evidence at this time?

9 MR. DUNCAN: I would assume that the Tribunal would
10 sustain Mr. Koenigsberg's objection. I will offer it and
11 forget -- to get it on the record, yes.

12 MR. KOENIGSBERG: And I will object on the same
13 grounds that Mr. Duncan objected to my introduction of that
14 book with Dr. Black.

15 CHAIRMAN ARGETSINGER: The objection is sustained.

16 BY MR. DUNCAN:

17 Q I'd like to read two paragraphs to you, Ms.
18 Messinger. They appear on what is their page 53. It is
19 really the first page of text, the second and third
20 paragraphs on that page, and I'll ask you before I read it,
21 once you've heard it, would you agree or disagree.

22 "For much of its existence prior to the consent
23 decree of 1941, publisher membership in the Society was
24 based on the firm having '...regularly engaged for a
25 period of not less than one year in the music publishing

1 business' (ASCAP Articles of Association, Article III:2,
2 emphasis mine).

3 "The Articles further stipulated that any composer
4 who '...regularly practices the profession of writing
5 music and/or texts of musical works and who shall have
6 had not less than five works of his composition or
7 writing regularly published' is eligible for membership
8 (ASCAP Articles of Association, Article III:2, emphasis
9 mine). The phrase 'regularly published', while not
10 explicitly defined, appears to have meant in practice
11 'published by an ASCAP member'. Membership applicants
12 also needed the sponsorship of at least two members of
13 the board, and needed the approval of the membership
14 committee before gaining entrance into the Society."

15 Would you agree or disagree with that paragraph?

16 A I would agree with the quoted language from ASCAP's
17 official documents.

18 Q All right, let's continue.

19 "From the way these rules were formulated, it is
20 clear that the Society allowed itself considerable
21 flexibility regarding membership. Indeed, there was an
22 even less formalized, but no less important, criterion
23 for membership. A term which continually appears in
24 ASCAP correspondence is 'vogue'. It was apparently not
25 sufficient that a publisher be in business for 'at least

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1 one year', or that a writer have 'at least five
2 regularly published works'. It appears that the works
3 had to be 'in vogue' or, in other words, sufficiently
4 popular to bring income to the Society. This of course
5 again meant that the Society virtually had complete
6 freedom in deciding on membership. At the same time,
7 membership in the Society was critical for media access,
8 publicity and performance-rights income."

9 Would you agree with that?

10 A Well, I don't know, frankly, what the expression
11 "vogue" meant. I would certainly agree that it had -- there
12 were no restraints on ASCAP for the first 27 years of its
13 existence in admitting members.

14 Q Over on the next page, one more very short, two-
15 sentence paragraph.

16 "What hope indeed? ASCAP had the power to
17 influence the economic fate of countless composers and
18 publishers. With membership virtually indispensable,
19 ASCAP had become a powerful gatekeeper within the
20 industry."

21 Would you agree or disagree with that?

22 A That's a conclusion that the writer draws. I think
23 the fact that for the last 49 years of its existence, ASCAP
24 has to take anyone into membership who has had one regularly
25 published work, has been a very good improvement for the

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1 music industry.

2 Q I'm not asking you that question, Ms. Messinger.
3 I'm going back to your testimony that BMI raided ASCAP's
4 members, and I assume we're talking about in the early days
5 of the formation of BMI.

6 A Well, they did. In order to get successful
7 publishers and bringing their catalog over, they did.

8 Q Did BMI raid ASCAP for writers of rhythm and blues
9 music?

10 A For the first ten years of BMI's existence, they
11 took no writer affiliates. They had no writers. They paid
12 no writers.

13 Q I didn't ask you that. I asked you did BMI -- all
14 right. Did it raid ASCAP for anyone connected with the
15 writing or publication of rhythm and blues?

16 A I have no idea, frankly. I think they would have
17 loved to have had people like George Gershwin and W.C. Handy
18 and others who were ASCAP members.

19 Q Did George Gershwin write rhythm and blues?

20 A I would say that George Gershwin did write some
21 rhythm and blues, yes.

22 MR. KOENIGSBERG: Mr. Chairman, as long as Mr.
23 Duncan is pausing in his examination, perhaps one of his
24 colleagues could collect this exhibit which has not been
25 accepted.

1 MR. DUNCAN: I'd like to make an offer of proof.
2 Since it was not accepted into evidence, I would like to
3 offer to prove through this exhibit that ASCAP had
4 restrictive membership practices in the early years; that one
5 of the reasons that BMI was formed was because of ASCAP's
6 restrictive membership practices; that writers of rhythm and
7 blues music which, in those days, meant black or soul music,
8 were not welcome into ASCAP, and I would further like to
9 prove that by the same token hillbilly music, as it was then
10 called -- I assume it would now be called country music, is
11 that correct? -- was also not welcomed into ASCAP.

12 And, therefore, the statement that Ms. Messinger
13 made, that BMI raided ASCAP, could not possibly be true, and
14 I make that offer of proof formally.

15 MR. KOENTIGSBERG: Mr. Chairman, Mr. Duncan is
16 entitled to make an offer of proof about an exhibit that has
17 not been admitted. That doesn't mean that what he is saying
18 is true. It doesn't mean that it's part of the record. He
19 is simply preserving a point for appeal, and so be it.

20 MR. DUNCAN: That is correct, and I think it is
21 also unnecessary under the Tribunal's rules, to recall the
22 document. I think the Tribunal takes it as the offer of
23 proof.

24 MR. KOENTIGSBERG: Perhaps the Tribunal's General
25 Counsel can enlighten me on that.

1 MR. CASSLER: Mr. Duncan is correct. The exhibit
2 is kept by the Tribunal. It accompanies the record, but it
3 doesn't become a part of the record.

4 MR. DUNCAN: Could I have your indulgence, please,
5 Mr. Chairman, off the record?

6 CHAIRMAN ARGETSINGER: We'll take a two-minute
7 break.

8 (Whereupon, a short recess was taken.)

9 MR. DUNCAN: Mr. Chairman, I just have a few more
10 questions, and I think we can probably finish up in time for
11 lunch.

12 BY MR. DUNCAN:

13 Q Still on page 11, Ms. Messinger, the paragraph
14 before your "B". You say BMI -- again, we're talking, I
15 believe, of the earlier years -- BMI had no affiliated
16 writers. All royalties were paid to publishers. I think you
17 so stated in response to an earlier question.

18 A Yes, I did.

19 Q Is that statement entirely true?

20 A I believe it to be true, yes.

21 Q Do you know whether or not, in the contracts that
22 BMT executed in those days with publishers -- do you know
23 whether or not those contracts contained a clause requiring
24 payment, or calling for payment by the publisher to the
25 writer of the song in question?

1 A Well, that may be, but BMI paid the publishers.
2 What the contractual relationship was of requiring publishers
3 to do, I don't know.

4 Q You don't deny that there was such a provision in
5 the BMT contract?

6 A I don't deny it, I don't know. I assume if you say
7 it is, it was.

8 Q On page 13, you attach an Exhibit 40-R which
9 relates to payments for foreign repertories in 1987. I'd
10 just like, again, to ask you an historical question or two.

11 In earlier years -- in fact, I might say, prior to
12 the present time, did not ASCAP contracts with foreign
13 societies require that ASCAP automatically be the
14 representative in the United States, unless the publisher or
15 the writer specifically -- unless the publisher, I should say
16 -- specifically asked that a BMI subpublisher be appointed?

17 A That's correct.

18 Q And it is within that context that a lot of foreign
19 music "automatically" ended up in the ASCAP repertory, is
20 that not correct?

21 A I don't know what you mean by automatically, but
22 that is the requirement of contract that music is in the
23 ASCAP repertory unless it specifically is excluded.

24 Q If you know, is that practice changing now?

25 A I don't think the amount of repertory is changed.

1 No, I don't know that that practice is changed.

2 Q You don't know it?

3 A No.

4 Q Ms. Messinger, you testified in your direct
5 testimony, specifically when you were talking about the local
6 TV license rates and what you called the package deal that
7 BMI had entered into, you referred to the fact that BMI was
8 owned by broadcasters, is that correct?

9 A I guess I did. I don't remember, frankly. You're
10 talking right this morning?

11 Q Yes.

12 A I think I was asked a question, or something was
13 asked -- the answer is yes. Let's assume the answer is yes.

14 Q Are any writers or any broadcasters on the ASCAP
15 Board?

16 A No.

17 Q Are any writers and publishers on the ASCAP Board?

18 A They are all writers and publishers.

19 Q Is any representative of Warner Brothers on the
20 ASCAP Board?

21 A There is the Warner Brothers Publishing Company on
22 the ASCAP Board, yes.

23 Q Does Warner Brothers own part of Time Magazine?

24 A Yes, it does. The parent company does.

25 Q And does Time Magazine own HBO?

1 A I believe they do own part of HBO.

2 Q Do they own part of Black Entertainment Network?

3 A If you say so. I just don't remember.

4 Q And do they not also own many cable operations?

5 A I believe they do. The parent company does.

6 Q And do you have a representative of MCA on your
7 Board?

8 A The publishing company of MCA, yes.

9 Q And does MCA own USA Network?

10 A It's a part-owner, I believe. The parent company
11 is.

12 Q And that's one of the largest basic cable
13 programmers in the country, is it not?

14 A I believe it is.

15 MR. DUNCAN: Your indulgence one last time, Mr.
16 Chairman.

17 (Off the record)

18 MR. DUNCAN: I have no further questions, Mr.
19 Chairman.

20 CHAIRMAN ARGETSINGER: Commissioner, do you have
21 any questions at this time?

22 COMMISSIONER AGUERO: No.

23 CHAIRMAN ARGETSINGER: Mr. Koenigsberg, any
24 redirect?

25 MR. KOENIGSBERG: Yes, just a bit, Mr. Chairman.

REDIRECT EXAMINATION

BY MR. KOENIGSBERG:

Q Taking the last point that Mr. Duncan raised with you, Ms. Messinger, when ASCAP's Board of Directors takes up the question of licensing an entity like USA Network, do the publisher representatives of companies under common control by the parent organization participate in those discussions?

A They do not.

Q And how specifically are they excluded from those considerations?

A They are asked to leave the room, for one thing.

Q Why is that?

A So there should be no question that they might enter into any kind -- exert influence or obtain any information that might be helpful to the parent. They are, of course, only one representative out of 24, or two out of 24.

Q And if a similar rule were in effect for the BMI Board of Directors, when the BMI Board of Directors considered broadcasting licenses, who would be sitting in the room?

A I believe only the President of BMI.

Q Now, on the question of the affiliations with foreign performing rights societies which Mr. Duncan just took up with you, what is the term -- the duration of ASCAP's

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1 agreements with foreign performing rights societies?

2 A One year.

3 Q Is that true across-the-board, without exception?

4 A Without exception.

5 Q Are those agreements reciprocal in nature? That is
6 to say, in the same agreement, does ASCAP give the right to
7 license and get the right to license, or are those rights
8 separately licensed and separate agreements.

9 A They are separately licensed and separate
10 agreements. We must give our repertory prior to getting any
11 repertory from abroad.

12 Q And if the foreign performing rights society wanted
13 to change the -- what we've referred to as the automatic
14 repertory rule, could it bring that matter up whenever the
15 license agreements expire -- the affiliation agreements--
16 pardon me -- expire?

17 A That's right. Since they are the only game in any
18 territory, by and large, unlike the United States, they have
19 quite a bit of influence on our relationship.

20 Q Mr. Duncan asked you some questions about the ASCAP
21 consent decree and about the mechanism for the determination
22 of reasonable license fees by the court.

23 Just so the record is clear, can users petition the
24 court for a determination of reasonable license fees, under
25 the ASCAP consent decree?

1 A If they find that our fees are unreasonable, yes,
2 they can.

3 Q Can ASCAP petition the court for a determination of
4 reasonable license fees?

5 A Well, not in that sense, no, they cannot. If I gave
6 that impression, it should be corrected.

7 Q Mr. Duncan asked you some questions about the
8 utility of the consent decree ratemaking mechanism in the
9 context of negotiations. If there were no consent decree and
10 no such mechanism in place, and a user was performing music
11 without a license, what steps could ASCAP take?

12 A ASCAP could sue them for infringement, and ask for
13 an injunction to prevent performance of the music.

14 Q In your opinion, is that a very powerful tool in
15 negotiation?

16 A Sure is.

17 Q To your knowledge, does BMI exercise that right
18 which is denied to ASCAP?

19 A It certainly has, very recently, too.

20 Q When?

21 A As I understand it, they went into court in
22 connection with HBO, attempting to seek an injunction against
23 the use of their repertory by HBO because they didn't have an
24 agreement, and BMI was able to apparently work out some
25 arrangement for a month or so whereby they would get an

1 increased fee and HBO would have the right to perform the
2 music.

3 Q Mr. Duncan asked you some questions about the
4 necessity for an ASCAP license and for a BMI license. If a
5 user of music performed SESAC music, would there be a
6 necessity for that user to obtain a SESAC license as well?

7 A Certainly, unless they wanted to be infringers.

8 Q And would it be fair to say that that user therefor
9 would need a SESAC license just as they would need an ASCAP
10 or a BMI license?

11 A Exactly the same need, to avoid being an infringer.

12 Q One last point. Mr. Duncan asked you about the
13 level of compulsory license fees, and as both ASCAP and BMI
14 are anticipating participation, I think it's fair to say, in
15 a proceeding upcoming before the Tribunal, which may well
16 concern the level of compulsory license fees, I want to give
17 you an opportunity to declare on the record, in your opinion,
18 do you think that the level of cable compulsory license fees
19 is too high, too low, or just right?

20 A Speaking for ASCAP and BMI, they are too low.

21 (Laughter.)

22 CHAIRMAN ARGETSINGER: Well, at least we have some
23 agreement among these parties, not necessarily the opinion of
24 the CRT --

25 (Laughter.)

1 MR. KOENTGSBERG: Mr. Chairman, there is the
2 opening shot in your next proceeding after this one. I have
3 nothing further of Ms. Messinger.

4 CHATRHAN ARGETSINGER: Thank you very much, Ms.
5 Messinger.

6 THE WITNESS: Thank you very much.

7 (Whereupon, the witness was excused.)

8 CHATRHAN ARGETSINGER: Now we will go off the
9 record.

10 (Discussion off the record.)

11 CHATRHAN ARGETSINGER: We will recess until 1:45.

12 (Whereupon, at 12:25 p.m., the luncheon recess was
13 taken.)

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AFTERNOON SESSION

(1:48 p.m.)

CHAIRMAN ARGETSINGER: Dr. Boyle, it's good to see you again.

THE WITNESS: It's good to be here.
Whereupon,

PETER BOYLE

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOENIGSBERG:

Q Would you state your name and position for the record?

A My name is Peter Boyle. I am Chief Economist for the American Society of Composers, Authors and Publishers.

MR. KOENIGSBERG: Mr. Chairman, Dr. Boyle's background and qualifications were set forth in his direct testimony, and there is, again, no reason to review them once more. And again, Mr. Chairman, after the rebuttal case was filed, Dr. Boyle discovered some mathematical errors in his calculations, which have been corrected in corrected testimony which has been submitted to the Tribunal and to opposing counsel, and that having been said, Dr. Boyle is available for voir dire.

MR. DUNCAN: I have a few questions. No questions.

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1 (Laughter.)

2 BY MR. KOENIGSBERG:

3 Q Dr. Boyle, would you please summarize for the
4 Tribunal, the principal purpose of your testimony?

5 COMMISSIONER AGUERO: Before you continue, Dr.
6 Boyle, on page 14 of your testimony, you have the full
7 adjustment for works -- one, two, three, four, and in the
8 fifth paragraph, 84 percent, 64 percent, and 82 percent,
9 respectively. Although the stations here are 78 percent.

10 THE WITNESS: That's correct.

11 COMMISSIONER AGUERO: I think it is 77 percent, but
12 I could be wrong.

13 THE WITNESS: For those three stations.

14 COMMISSIONER AGUERO: Uh-huh.

15 THE WITNESS: Well, if we had Exhibit 6, I could
16 check it for you. I don't have my original direct case.

17 COMMISSIONER AGUERO: I may be wrong, you know.

18 THE WITNESS: It may have been how we calculated
19 it. What I did, I believe, was to go to this document and
20 add up the total credits for the three stations. We would
21 have found WVIZ -- is that a typo? Is that WVIA?

22 MR. KOENIGSBERG: It should be WVIA. I think
23 that's a typo.

24 THE WITNESS: I think the first station -- excuse
25 me -- is WVIA, which I really need to look at Exhibit 5, I

1 guess.

2 MR. KOENIGSBERG: Commissioner Aguero, may I ask
3 Dr. Boyle a question which may answer your question? The
4 answer to my question may also answer your question.

5 COMMTSSIONER AGUERO: Uh-huh.

6 BY MR. KOENIGSBERG:

7 Q Dr. Boyle, turning your attention to ASCAP Exhibit
8 6, I believe Commissioner Aguero is asking you if the number
9 that you give on page 14 of your testimony is an average of
10 the three percentages, in which case it would be,
11 Commissioner Aguero, 77 percent, or not an average of the
12 three but, rather, computed in a manner adding up the credits
13 on Exhibit 6.

14 A I believe what I did -- I can verify it -- I added
15 up the total credits for each of the three stations --

16 COMMTSSIONER AGUERO: You mean 84, 64 and 83?

17 THE WITNESS: No, the actual credit numbers from
18 the exhibit. So, for WVIA it would be 17,284, and similar
19 numbers for the other two stations, then added up the three
20 ASCAP numbers -- the credits, not the percentages here, but
21 the actual credit -- and then did the division.

22 COMMISSIONER AGUERO: Okay. Fine. Thank you very
23 much.

24 THE WITNESS: But that station should be WVIA, not
25 WVIZ. Excuse me, I missed that. The third line on page 14.

1 BY MR. KOENIGSBERG:

2 Q So, Dr. Boyle, if you would, would you summarize
3 the principal purpose of your testimony for the Tribunal?

4 A My rebuttal testimony will show that BMI's 1987
5 Distant Signal Survey is ripe with errors, both in terms of
6 its execution and in terms of its basic methodology.

7 Q And can you explain how that is so to the Tribunal?

8 A Well, first, BMI made significant errors in the way
9 it tallied music performances in its 1987 Distant Signal
10 Survey. In some cases, it counted either the wrong music or
11 it did not count the full duration of music. In other cases,
12 it completely omitted programs with significant music use.

13 The bottom line of this is that BMI overestimated
14 its share of performances and underestimated the duration of
15 ASCAP music on the stations it tallied.

16 Secondly, BMI made a methodological error when it
17 weighted the percentage of music duration on film, and
18 separately, the percentage of music duration on TV series,
19 rather than using the actual duration in terms of minutes and
20 seconds of that music.

21 The third type of error involves the use of the
22 Nielsen data. The Nielsen data should have been used as it
23 has been in every other cable proceeding, as a measure of
24 audience size, of viewing, not simply as a stopwatch to
25 measure programming running time.

1 And, fourth, BMT overestimated the duration of non-
2 ASCAP/non-BMI music.

3 Q And when these errors are corrected, what results?

4 A We find that ASCAP's share is more than 65 percent,
5 and BMI's share is less than 35 percent. The results using
6 their own durational approach, their own methodology, are
7 virtually identical to the results that we put forward in our
8 direct case.

9 Q Dr. Boyle, let's start with the inaccuracies in
10 BMT's cue sheet tallying. Can you explain those to the
11 Tribunal?

12 A Yes. BMT counted the wrong music, so they
13 drastically underrepresented the duration of all music on
14 certain programs, and also drastically underrepresented the
15 duration of ASCAP music on those programs.

16 Q Can you give the Tribunal a concrete example of
17 where that occurred?

18 A The Tom and Jerry program is an excellent example.
19 The first problem there is that BMI processed only cue sheets
20 for Tom and Jerry cartoons, yet that's not all that's shown
21 on the Tom and Jerry program. There are other cartoons
22 shown, and there's other live action programs, like the Three
23 Stooges and the Li'l Rascals.

24 So, in this case, BMT tallied the wrong cue sheets.
25 They didn't count the right music for the Tom and Jerry

1 program.

2 Q And how did you correct for that error?

3 A Well, we analyzed the duration of the music that
4 BMI omitted by looking at all the different program elements
5 on the Tom and Jerry Show. We used BMI's methodology in this
6 case. If we could identify the specific cartoon, the
7 specific episode broadcast, we used that cue sheet. If we
8 couldn't, we used an average cue sheet compiled in the same
9 way, calculated in the same way that BMI --

10 CHAIRMAN ARGETSINGER: Are you suggesting that the
11 mistake, what you get as a mistake in Tom and Jerry, that
12 same mistake was carried out through many, many other
13 programs?

14 THE WITNESS: It was certainly carried out on the
15 Bozo program as well, and both of those are significant
16 programs in terms of the amount of music used, and there were
17 others as well, at least one and possibly two other programs
18 as well, where this same type of mistake was made.

19 CHAIRMAN ARGETSINGER: So, it was in some isolated
20 programs you found this. How much does just this one factor
21 alone change their survey, do you know?

22 THE WITNESS: Well, if we turn to Exhibit 34, which
23 we are certainly going to get to later as well, this is
24 essentially a reproduction with corrections of BMI's Exhibit
25 B-8 from their original testimony. We got the different

1 stations -- WTBS, WSBK and the other stations -- here, and
2 we've shown the tally of music, like BMI organized it, for
3 film and TV series separately.

4 We've got columns as BMI did, for BMI music and
5 Other music. You take the WTBS example, the first number
6 there, WTBS film, is the original numbers from their Exhibit
7 B-8. That's what they claimed originally. And in this case,
8 we didn't make any adjustments to that. So, they originally
9 had in their exhibit 226 minutes of BMI music, 911 minutes of
10 Other music, non-BMI music.

11 The next line, WTBS-TV, shows that BMI originally
12 claimed 462 minutes of BMI music from their original Exhibit
13 B-8 in the direct case, and 379 minutes of Other music. Then
14 the two items underneath that are the corrections we're
15 making.

16 Here you can see that Tom and Jerry adds 37 minutes
17 of BMI music and 319 of Other music, almost as much as they
18 originally tallied for all the other programs on WTBS-TV
19 series.

20 Further down the page, for WPIX, for instance, the
21 Tom and Jerry program wasn't shown with as great frequency
22 there, but BMI omitted .63 of a minute of BMI music and
23 nearly 18 minutes of non-BMI music, predominantly ASCAP music
24 there, and the Bozo program is on WGN, further down the page
25 near the very bottom, BMI omitted 38 minutes of BMI music and

1 110 minutes of non-BMI music. So, you're talking about very
2 substantial numbers in relationship to the music they claimed
3 originally.

4 CHAIRMAN ARGETSINGER: How does the bottom line
5 come out percentagewise on this?

6 THE WITNESS: I haven't calculated it just for Tom
7 and Jerry or just -- I calculated for all the different
8 errors, and when you do that, when you make that adjustment
9 and the other adjustments we talked about, about methodology,
10 they come out with under 35 percent and we have 65 percent.

11 CHAIRMAN ARGETSINGER: But I just wondered if you
12 had set out each one.

13 THE WITNESS: No, I haven't.

14 CHAIRMAN ARGETSINGER: Okay. Fine. I'm sorry--
15 go ahead.

16 MR. KOENIGSBERG: No, no, quite the contrary, Mr.
17 Chairman, thank you. And I do think you'll see as we go
18 through this, that there are -- Dr. Boyle's testimony will, I
19 think, address the question that you asked him in many ways.

20 BY MR. KOENIGSBERG:

21 Q Dr. Boyle, turning to your testimony at the bottom
22 of page 3, and let's pursue Commissioner Argetsinger's
23 question to you in terms of whether this the omission of Tom
24 and Jerry from TBS was a significant error. Was it
25 significant?

1 A It certainly was. It was very significant. Tom
2 and Jerry appeared on WTBS 11 different times during BMI's
3 composite, a total of 15 hours of programming out of the
4 approximately 168 hours during the entire week. It's a very
5 substantial part of WTBS's programming day.

6 The tapes that we had that allowed us to determine
7 which particular cartoons and live action features were shown
8 as part of that show, and the analysis of the cue sheets,
9 indicate that an average hour of the Tom and Jerry program
10 contains nearly a half-hour of music, yet BMI would only
11 tally one cue sheet for just the Tom and Jerry Show, and they
12 only tallied 75 minutes of music for the entire week instead
13 of the 431 minutes of music that they should have tallied had
14 they done it properly.

15 Q So, can you tell Chairman Argetsinger and the other
16 Commissioners, what percentage of music BMI tallied on Tom
17 and Jerry as opposed to what percentage of music they should
18 have tallied?

19 A Yes. In this case, by only tallying 75 minutes of
20 music, they tallied less than 20 percent, less than one-fifth
21 of what they should have tallied, the 431 minutes of music,
22 using their own methodology.

23 Q And if we look at the middle paragraph on page 4 of
24 your testimony, is that a significant omission from all the
25 TV series on WTBS which BMI tallied?

1 A It certainly is. The 431 minutes -- well, the
2 difference of 356 additional minutes of music are more than
3 40 percent of the total WTBS music time, both film and
4 series. And as we saw just a moment ago, the non-BMI music
5 is almost equal to all the non-BMI music in all the other
6 programs that they tallied as series.

7 Q Now, tell us about the Bozo program.

8 A The Bozo program is another example of this type of
9 inaccuracy. Once again, BMI tallied the wrong music, and
10 they undercounted the total duration of music. In this case,
11 it turns out that their own share of music was understated.
12 They had a larger share of the music after correction, but
13 they left out a significant amount of non-BMI music.

14 CHAIRMAN ARGETSINGER: I wondered if I was reading
15 that correctly.

16 THE WITNESS: That's right, it's their own share,
17 in this case. Again, we had tapes of Bozo programs broadcast
18 on WGN during 1987, and we were able to turn to those tapes
19 to determine the different cartoons and other features that
20 were carried as part of that program.

21 We were able to use BMI's methodology to construct
22 average cue sheets where necessary, or to use the actual cue
23 sheets where we could indicate the specific episode or
24 program element broadcast, and that allowed us to determine
25 that the Bozo program, on average, contains more than three

1 cartoons per hour, not just the one cartoon that BMI would
2 have processed.

3 And, in fact, BMI tallied only Bozo the Clown
4 cartoons, yet for the tapes we had available, only one out of
5 the 34 different features was a Bozo the Clown cartoon; the
6 other 33 were other cartoons. They tallied the wrong music.

7 BY MR. KOENIGSBERG:

8 Q Dr. Boyle, turning to page 6 of your testimony
9 then, what other errors do you find in BMI's cue sheet
10 tallying?

11 A Well, in some cases, they claimed music that wasn't
12 theirs, and they had that information in their own records.
13 One example is the G.I. Joe and Transformer Shows. When BMI
14 analyzed the cue sheets, they claimed the music written by a
15 PRS member, the British Performing Rights Society member,
16 Johnny Douglas, which is published by an ASCAP publishing
17 company, Wild Star Music, Inc. The PRS music written by
18 Johnny Douglas was licensed through ASCAP, and BMI knew and
19 acknowledged that long before this proceeding began.

20 Q How do you know BMI knew and acknowledged it long
21 before this proceeding began?

22 A Well, if you turn to Tab 32, Exhibit 32-R, we have
23 a copy of a letter from BMI's Vice President International,
24 Becky Schnable, to the British Performing Rights Society,
25 PRS, and it's dated January 31, 1989, nearly a year ago.

1 In the third full paragraph there, the second
2 sentence says "As of this date, January 31, 1989, we do not
3 claim Johnny Douglas' music for the above two cartoon
4 series", and the last sentence says "Johnny Douglas' music
5 for these two cartoons was never cleared with BMI".

6 Q Never cleared with BMI.

7 A That's what the letter says, that's right.

8 Q Do you have any other examples of this sort of
9 mistallying?

10 A Yes. Another example is the film Lilies of the
11 Field, which was carried on WGN. In this case, the notations
12 on the cue sheets that they provided to us in document
13 production, indicate that BMI was claiming all the
14 copyrighted music, the duration of all the copyrighted music
15 on that film. Yet there was a correction attached to that
16 cue sheet, which was part of BMI's records and which they
17 also furnished to us in document production, which shows that
18 some of the music was not in the BMI repertory. This
19 correction is behind Tab 33, the second title there, listed
20 Amen, is published by an ASCAP publishing company, Schumann
21 Publishing Company, and is in the ASCAP repertory, and that
22 music should have been credited to ASCAP.

23 Q Dr. Boyle, again, where did you get this correction
24 sheet?

25 A This came from BMI, from their own documents that

1 they provided to us as part of the document production.

2 Q Now, what other sorts of omissions did BMI make in
3 tallying music duration?

4 A Well, another very important type of omission
5 concerns programs where there are not cue sheets. And this
6 is particularly important because one of the programs, Night
7 Tracks, is a heavy music using program. It uses quite a lot
8 of music. In fact, BMI's own witness said that it contains
9 virtually wall-to-wall music. It contains music videos.

10 I'm sure the Commissioners remember that this was
11 an important part of the 1983 Phase I Cable Distribution
12 Proceeding. It talked about this particular program. It's
13 on 13 hours a week -- again, a substantial part of the BMI
14 composite week.

15 Q Again -- and I think this goes to -- I think this
16 also addresses Chairman Argetsinger's question. Can you tell
17 us the significance of the omission of Night Tracks music to
18 a durational study?

19 A Yes. When we tallied and timed the music on the
20 tapes that we had from 1987, and the information indicated
21 that 594 minutes of music should have been included during
22 BMI's composite week, BMI tallied a total for all films and
23 all TV series of 1979 minutes of music. So, the Night Tracks
24 music represents an additional 30 percent over and above the
25 music that they tallied in their original study.

1 Q How would you characterize an omission of 30
2 percent of all music duration on WTBS?

3 A Well, it's obviously a very significant error,
4 particularly since the vast bulk of that music is in the
5 ASCAP repertory. When we added up the music using BMI's own
6 durational methodology, 69 percent of the duration was for
7 music in the ASCAP repertory, 31 percent was for music in the
8 BMI repertory, which is far different from the 50-50 split
9 that their witness, Mr. Smith, indicated might be the case,
10 during his direct testimony.

11 BMT significantly underestimated the total amount
12 of music used, and significantly shortchanged ASCAP in
13 tallying durations in this case.

14 Q You've referred to Exhibit 34. Could we turn to
15 that exhibit, and could you explain to us again, in terms of
16 the total picture, what Exhibit 34 shows?

17 A Certainly. As we went through the WTBS film line
18 it presents the numbers that BMI originally tallied in their
19 Exhibit B-8. There haven't been any changes here. If there
20 were changes, they'd be indicated directly underneath it.

21 WTBS-TV, the first line, 462 minutes of BMI music,
22 shows what they processed in their original tally. Then we
23 have the effect of the mistakes in Tom and Jerry and Night
24 Tracks, an additional 37 minutes of BMI music for Tom and
25 Jerry, 185.55 minutes for Night Tracks, and on the non-BMI

1 side, an additional 319 minutes of music for Tom and Jerry
2 and an additional 408 minutes of music for Night Tracks.

3 We then have the corrected WTBS-TV total, what the
4 amount of music duration for WTBS-TV series should have been
5 had it been tallied properly. And you can see for BMI music,
6 it's 685 minutes, and that's arrived at by taking the 462
7 minutes they originally processed, plus the 37 minutes that
8 they omitted of BMI music for Tom and Jerry, plus the 185.55
9 minutes for Night Tracks.

10 Similarly, the corrected number for non-BMI music
11 for TV series is 1,106.85 minutes as shown in the column on
12 the right, and that's arrived at in the same way. You take
13 the 379 minutes that BMI initially claimed. You add the 319
14 additional minutes from the Tom and Jerry mistakes, and you
15 add the 408 additional minutes from the Night Tracks
16 omission. So, their number for series for non-BMI goes from
17 379 to 1106.

18 Q And if we add up the total minutes that BMI counted
19 for WTBS-TV, if my addition is correct -- and you can check
20 me -- that's 462 plus 379 -- you come up with about 840
21 minutes, is that right?

22 A That's the film plus the series --

23 Q No, no, that's just the WTBS-TV that BMI originally
24 counted.

25 A I'm sorry, what did you say we're doing?

1 Q We're adding 462, approximately, with 379 -- the
2 BMT music and the non-BMT music.

3 A Right.

4 Q So, BMI originally counted 840 minutes,
5 approximately, of music for the WTBS-TV series?

6 A That's correct.

7 Q And if we add up the corrected WTBS-TV series--
8 that is, the total duration of music that should have been
9 counted -- we come up with what, about 1800 minutes?

10 A That's right.

11 Q That's more than twice as much music should have
12 been counted, is that right?

13 A That's exactly right. And I guess the other point
14 that goes with that is, those errors aren't spread evenly.
15 They are predominantly in a non-BMI column.

16 Further on this exhibit then, we've done similar
17 calculations for each of the other stations. For WSBK, we
18 have the corrections. We have the 20-Minute Workout, the
19 Saber Riders, the Three Stooges, to come up with a corrected
20 WSBK figure. We have changes for WPIX, for WOR, for WGN.
21 There, in the case of the film, you see the addition, the
22 change, switch in the music for Lilies of the Field as well
23 as the changes for Bozo, G.I. Joe, and Transformers.

24 And since their composite station, WRST, was an
25 average of WGN, WWOR, WPIX and WSBK, that number also has to

1 be corrected or revised because, once we've changed each of
2 those four other stations, you get a new average, and that is
3 shown as well. We didn't show the original numbers claimed
4 there because it would have just added a couple of lines to
5 the table and been confusing, I think.

6 Q And the WRST change does not include WTBS-TV, is
7 that correct?

8 A That's correct. We used the same methodology BMI
9 did originally.

10 Q It does not include the Tom and Jerry correction on
11 WTBS?

12 A Nor the Night Tracks correction on WTBS, just the
13 other four stations.

14 Q Now, you say that BMI made a serious methodological
15 error or errors. Would you tell the Tribunal what those
16 methodological errors were?

17 A Yes. Well, BMI made an error when they weighted
18 the percentage of music duration on film, and separately the
19 percentage of music duration on television series, rather
20 than tallying the actual minutes of music for film and
21 series.

22 Q Can you explain the nature of that methodological
23 error?

24 A There's really two implicit assumptions behind that
25 approach that they took. One is that an average hour of film

1 uses the same amount of music as an average hour of
2 television series, overall, that the music density, the
3 amount of music per hour, on average, is the same between the
4 two categories.

5 The second assumption in doing that is that each of
6 the stations use, on average, about the same amount of music
7 per hour. That's the only way that weighting those
8 percentages makes sense, and that doesn't necessarily have to
9 be the case. In fact, it can yield widely incorrect results
10 if those conditions aren't met.

11 Q And can you illustrate to us the wildly incorrect
12 results that would result from this methodology?

13 A Those are shown in Exhibit 28-X, and that's been
14 attached to this testimony. It's Tab 28. It's a little bit
15 out of order in the numerical sequence, but it's in order in
16 terms of the presentation here.

17 This was a cross-examination exhibit that was
18 discussed during the direct case, and we provided a
19 hypothetical example to show just the kinds of inaccuracies
20 that can occur from this approach.

21 Q And what are those inaccuracies?

22 A Well, if we go through the exhibit, the first page
23 of the exhibit sets out the assumptions. We've got a
24 hypothetical station here which we've called WBMI, and we've
25 assumed that it broadcasts a movie for two hours during its

1 composite week. That's all the film that it shows. And that
2 the movie contains 100 minutes of music, all of which is in
3 the ASCAP repertory.

4 We've also assumed that the station carries 10
5 hours of series, 20 half-hour episodes, during the composite
6 week, and that each of those episodes contains a minute of
7 music, all in the BMI repertory, so that there's 20 minutes
8 of music in the BMI repertory, one minute in each of 20
9 episodes of a syndicated series.

10 So, if you add up the total music time, as you can
11 see at the bottom of that page, the table there, there's 100
12 minutes of ASCAP music, or 83 percent of all the music from
13 the film, and there's 20 minutes of BMI music, or 17 percent,
14 from the series.

15 If you turn to the next page, we go through the
16 weighting methodology. We start off with an ASCAP share of
17 83 percent and a BMI share of 17 percent, based on duration.
18 When you go through the weighting, you're going to get
19 exactly the opposite results.

20 The way BMI's methodology worked, they took the
21 percentage of BMI music on films -- in this case, it was
22 zero. We assumed that all music was ASCAP. And shown in
23 column two then, there's zero percent BMI music in film, and
24 they weighted that by the percentage of program time
25 accounted for by films -- in this case, 17 percent, or two

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1 hours of film out of a total of 12 hours of programming
2 during the week.

3 Thus, when they multiplied the zero percent BMI
4 share by the 16.7 percent Nielsen weight, they get zero
5 percent for weighted BMI time, as shown in the last column on
6 the right. They do the same thing for series. There, BMI
7 has 100 percent, all the music, as shown in column two, and
8 they weight that by the share of time accounted for by the
9 series, 83.3 percent, the other ten hours of programming out
10 of the 12 hour total. When they do that multiplication, they
11 get a weighted BMI time for series of 83.3 percent.

12 So, according to their own methodology, their
13 weighted share is 83.3 percent, despite the fact that they
14 only have 17 percent of the total music duration during that
15 week. It's exactly the opposite.

16 Q Now, Dr. Boyle, suppose you were to alter the
17 hypothetical. Suppose you were to give BMI much more music.
18 Suppose you were to give BMI a 50-50 split of the music with
19 ASCAP. What then would be the result? I refer specifically
20 to your continuing testimony at the bottom of page 9.

21 A That's right. In this case, we increased the
22 amount of BMI music in the television series. Instead of
23 having one minute, we said let's multiply it by 5, let's get
24 five minutes per episode so that the split is 50-50.

25 Interestingly enough, BMI's share using its

1 weighting methodology, doesn't change a bit. We made a
2 dramatic change in the total amount of BMI music, and they
3 still come out, under their calculations, with 83.3 percent
4 of the total because, again, in column two, BMI's share of
5 the film is zero percent, and film is 16.7 percent of the
6 time --

7 Q Where are we looking here?

8 A I'm sorry -- I'm on page 10, the table on the top
9 of page 10, which lays out the methodology. They've taken
10 their share of film music, zero percent in column two, and
11 multiplied it by film share of total programming time, what
12 they call the Nielsen weight, of 16.7 percent. The result is
13 a weighted time of zero.

14 They've got 100 percent of the time in television
15 series, they weight it by the 83.3 percent occupied by
16 television series out of the total programming week, and they
17 get 83.3 percent again. In this situation, whether they had
18 a second of music, or a minute of music, or 600 minutes of
19 music in the television series, they come up with exactly the
20 same answer each time -- 83.3 percent.

21 Q Did you find any other errors in BMI's methodology?

22 A Yes. The other error concerns the way the Nielsen
23 data is used. Every time the Nielsen data has been used in
24 prior proceedings, and when the Tribunal has relied upon that
25 data, it's been with a very specific context. It's been as a

1 measure of the audience for viewing of the different types of
2 programs at issue.

3 The way it was used here was strictly as a
4 stopwatch, strictly to count the amount of minutes of
5 programming time for film and series, not to measure the
6 importance in terms of viewership or audience.

7 Q And what correction should be made in that regard?

8 A Well, these corrections are shown --

9 Q I'm sorry, Doctor, I'm asking you specifically,
10 turning to your testimony at the top of page 11, what
11 corrections should be made, if the Nielsen data is to be
12 used, in your opinion?

13 A Well, if we're going to follow BMI's approach and
14 use the duration of music as a measure of value, you have to
15 weight it by the Nielsen measures of audience size, not the
16 stopwatch approach in terms of the minutes of programming.

17 Q And when you make these corrections, what results?

18 A The result is that BMI's share is 33.7 percent, not
19 50 percent, as they claimed originally, and that's all laid
20 out in Exhibit 35-R.

21 Q If we could turn to that exhibit, Dr. Boyle, could
22 you explain it column-by-column to the Tribunal?

23 A Certainly. Page 1 is the equivalent of BMI's
24 Exhibit B-8, but we've corrected for the BMI errors in
25 tallying music duration for Tom and Jerry, Bozo, Night

1 Tracks, and the other programs. So, column one shows the
2 corrected minutes of BMI music on each station, for film and
3 TV series. This data is the same form as B-8 is for the
4 first two columns, and the numbers come directly from Exhibit
5 34-R, which we talked about a few minutes ago.

6 Column two then shows the corrected duration of
7 non-BMI music for each of those stations, and the third
8 column is take from the Nielsen data. ASCAP and BMI both
9 purchase that data, and it shows the Nielsen household
10 viewing per quarterhour for film and for TV series on WTBS,
11 on WSRK, on WPIX, and on all the other stations.

12 Q Does using that data correct the error of using
13 Nielsen as a stopwatch rather than as a measure of audience
14 size?

15 A That's correct, and the results of those
16 calculations are really shown on the second page of the
17 exhibit where we multiply the BMI music duration on films on
18 WTBS -- not a percentage, but the actual duration of music,
19 by the average viewing per quarterhour of films on WTBS.
20 That's the number shown in column four here. And we do the
21 same thing for the non-BMI music.

22 We take the actual minutes of duration from page 1
23 of the exhibit, and multiply it by the Nielsen viewing for
24 films for WTBS, to get the number shown in the first line in
25 column five. We do the same calculations for TV series, and

1 we do the same calculations for each of the other stations.
2 Minutes of music times Nielsen viewing, not percentages.

3 Q Is page 2 of your Exhibit 35-R the equivalent of
4 anything in BMI's direct case then?

5 A It's the equivalent of their Exhibit B-9, but
6 corrected to eliminate that methodological problem of using
7 percentages, weighting percentages. It weights the actual
8 music duration in this case.

9 Q If you would continue, Dr. Boyle.

10 A Then the third page of this exhibit, which is
11 really the equivalent of BMI's Exhibit B-10, applies the
12 Larson weights, the same Larson weights that ASCAP and BMI
13 have agreed upon, to the Nielsen-weighted music duration,
14 takes the total BMI music as weighted by Nielsen, for WTBS,
15 combining both film and series, and multiplies the number by
16 the Larson weight. It takes the total duration of non-BMI
17 music in the middle column there, the one that's labeled "8"
18 for film and series on WTBS, and weights that -- as weighted
19 by Nielsen, again -- and multiplies that by the Larson weight
20 shown in column six. The total, the last column on the
21 right, adds up to BMI music and non-BMI music for WTBS and,
22 similarly, for each of the other stations, the other four
23 plus the composite station.

24 And the very bottom of that gives you the result.
25 It gives you the BMI share of 33.7 percent, when the cue

1 sheet tallies and the other methodological errors are
2 corrected.

3 Q That's the bottom line then, is it?

4 A That's correct. It's very, very close to the
5 numbers we put forth in our direct case.

6 Q If you could turn to page 13 of your testimony, Dr.
7 Boyle, what further correction do you have as to BMI's direct
8 case?

9 A One other point they raise concerns the music
10 that's in neither the BMI nor the ASCAP repertories. Alan
11 Smith guessed that it's about 5 percent of the total music on
12 distant signals.

13 We took a look at all the cue sheets that BMI
14 provided to us in document production, for the programs
15 carried by WTBS, and we went through and analyzed the non-
16 ASCAP/non-BMI music there. That's public domain music, SESAC
17 music, and other music that's in neither the ASCAP nor the
18 BMT repertories, and we found for this station, for their
19 composite week, that the music that's neither ASCAP nor BMI
20 is only 3 percent and not 5 percent, and the vast bulk of
21 that music is public domain music.

22 MR. KOENIGSBERG: Now, Mr. Chairman, Dr. Boyle's
23 testimony includes some miscellaneous points as well, which
24 are contained on pages 13 through 17 of his testimony and,
25 again, in the interest of expedition, we don't see any need

1 to have oral testimony on these points, and I would add,
2 Commissioner Aguero, because of your questioning of Ms.
3 Messinger this morning, that it is not because we think these
4 are unimportant or they are throwaways, but it's that to
5 explain them doesn't require, it seems to us, oral testimony,
6 and there's no point in taking time up doing that.

7 THE WITNESS: I'd certainly be glad to answer any
8 questions that you have on them.

9 BY MR. KOENIGSBERG:

10 Q Therefore, Dr. Boyle, if we could turn to page 18
11 of your testimony, would you tell us your conclusion based on
12 your corrections of BMI's durational survey?

13 A Well, as I've said before, neither ASCAP nor BMI
14 distribute royalties based solely on the duration of music.
15 It's certainly a factor, but neither of us do it solely based
16 on duration. I don't believe the Tribunal should either.
17 However, when we correct the errors, the inaccuracies, the
18 problems with BMI's durational distant signal survey, we find
19 that ASCAP's share is more than 65 percent, BMI's share is
20 less than 35 percent.

21 The results even using their own durational
22 approach, are very, very close to the numbers we put forward
23 in our direct case. It seems to me we are simply not that
24 far apart.

25 MR. KOENIGSBERG: Mr. Chairman, we have nothing

1 further.

2 CHAIRMAN ARGETSINGER: Mr. Duncan, would you care
3 for cross-examination?

4 MR. DUNCAN: Oh, yes.

5 CHAIRMAN ARGETSINGER: Very good.

6 CROSS-EXAMINATION

7 BY MR. DUNCAN:

8 Q On the last point you made, Dr. Boyle, on the non-
9 ASCAP/non-BMI music being 3 percent rather than 5, on page 13
10 of your testimony, that was for WTBS only, is that right?

11 A That's correct, and the reason we chose WTBS is
12 because my expectation was you are more likely to find this
13 type of music, particularly the public domain music, in the
14 older films. And I think that expectation is borne out by
15 the data.

16 So, since BMT's own witnesses have said WTBS has a
17 higher concentration of films where there's more likelihood
18 of finding this type music, seemed a conservative approach.
19 It was more likely to -- you're likely to have the highest
20 share on WTBS alone. I think this is the maximum, the cap.
21 Anything else I would expect to be lower than that, given the
22 programming mix of the other stations.

23 Q My question was that you took the cue sheets from
24 WTBS only, is that correct?

25 A Yes.

1 Q You did not do any other stations?

2 A No.

3 Q Now, if I could invite your attention to page 3 of
4 your testimony, in line 3 from the top, of the first
5 paragraph, first partial paragraph, you say "Rather, as
6 ASCAP's survey tapes made during the '87 review", what kind
7 of tapes were those?

8 A Audio tapes made during the course of our survey. .

9 Q Those are audio tapes only?

10 A Yes.

11 Q And that means sound tapes, is that right?

12 A Yes.

13 Q And you obviously didn't listen to them yourself,
14 did you?

15 A Not all of them. They were analyzed --

16 Q Have you listened to any of them?

17 A I've listened to portions of a couple of them, yes.

18 Q Was it your experience that it was sometimes
19 difficult to identify a cartoon just by listening to an audio
20 tape?

21 A Normally, we can identify the type of cartoon. The
22 theme music is particularly -- is identifiable, whether or
23 not it is a Bugs Bunny cartoon, or a Tom and Jerry cartoon,
24 or other types. There were two specific ones that I recall,
25 where they couldn't identify the particular type of cartoon

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1 that was carried, but that's two out of a rather large
2 number.

3 Q So, at the risk of paraphrasing your answer, my
4 question was, is it not sometimes difficult to identify a
5 cartoon just from an audio tape, and would it be correct to
6 say your answer is yes?

7 A Yes, in a very small number of cases.

8 Q And what about a particular episode of a cartoon.
9 Was that easily identifiable from audio tape?

10 A That typically is more difficult. There were some
11 cases where we could but, by and large, we couldn't and,
12 therefore, we used BMI's methodology of an average cue sheet.

13 MR. DUNCAN: Can we go off the record just for a
14 moment, Mr. Chairman?

15 CHAIRMAN ARGETSINGER: Yes.

16 (Off the record)

17 BY MR. DUNCAN:

18 Q Dr. Boyle, I show you two exhibits which I would
19 like marked for identification --

20 MR. DUNCAN: Cross-Examination 2A and 2B.

21 MR. KOENIGSBERG: I think that would be 1A and 1B.

22 MR. DUNCAN: There was one marked for
23 identification.

24 MR. KOENIGSBERG: The book wasn't marked for
25 identification, as I recall.

1 MR. DUNCAN: Yes, it was.

2 MR. KOENIGSBERG: It was made as an offer of proof,
3 but it was not marked for identification.

4 MR. DUNCAN: For identification it wasn't marked?

5 MR. KOENIGSBERG: I didn't think it was.

6 COMMISSIONER AGUERO: It was marked for
7 identification.

8 (Whereupon, the documents were
9 marked for identification as
10 BMT Exhibit XR-2A and XR-2B for
11 identification.)

12 THE WITNESS: Mr. Duncan, --

13 MR. DUNCAN: Yes.

14 THE WITNESS: Which one is 2A?

15 MR. DUNCAN: 2A is the one that has the handwritten
16 letter on top.

17 THE WITNESS: And 2B is the one that starts with
18 Heckle and Jeckle, the Talking Magpies?

19 MR. DUNCAN: Right.

20 THE WITNESS: Thank you.

21 MR. KOENIGSBERG: Mr. Chairman, may we confirm that
22 there will be a sponsoring witness for these?

23 MR. DUNCAN: Yes, Mr. Smith, Alan Smith, will
24 sponsor these.

25 BY MR. DUNCAN:

1 Q Dr. Boyle, if I represent to you that what has been
2 marked as Exhibit 2A for identification is a so-called
3 "rundown sheet" which was obtained from station WTBS, would
4 you accept that, please?

5 A (Perusing document) I don't know what that means.
6 What is a "rundown sheet"?

7 Q You don't know what a "rundown sheet" is?

8 A No.

9 Q Well, it is for the program Tom and Jerry, as you
10 can see and it purports to list for Tom and Jerry, for the
11 time period in question which is for Thursday, what episodes
12 appeared on that program. And this was obtained from WTBS,
13 as Mr. Smith will testify.

14 I am just asking you to accept that.

15 A (Perusing document)

16 Q It happens to be three days from the composite
17 week, Thursday, and Wednesday. There are two for each day,
18 an AM and a PM.

19 A I see. Is that the upper right-hand corner, is
20 that supposed to be --

21 Q Yes, AM Thursday.

22 A I thought it was somebody's initials and name.
23 Okay.

24 Q PM Thursday and AM Monday, PM Monday.

25 A But the specific dates are not shown, correct?

1 Q The dates are not shown, that is correct.

2 A Could you ask your question again?

3 Q Yes, I just asked you to look through this and
4 accept that it was obtained from WTBS.

5 A Okay.

6 Q All right?

7 A Yes.

8 Q Now, if you would look on the first page you will
9 see the third entry down, a Rascal's episode, "Pinch Singer"?

10 A (Perusing document)

11 Q The third one down.

12 A Yes.

13 Q And if you would go over to the third page --

14 A This is the third page behind the cover sheet?

15 Q The third page behind the cover sheet, yes.

16 A Okay.

17 Q The second one down, you will see another Rascal's
18 episode called "Washing" --

19 A Whatever you tell me, I am not going to be able to
20 confirm it from this. I tell you, I have no idea what that
21 says.

22 Q I am going to give you some cue sheets. It is
23 "Washy Irony", I'm sorry. Just note that, please.

24 A Would you spell that?

25 Q W-a-s-h-y Irony. I am going to back this up with

1 cue sheets.

2 A Okay. I would never guess that. Sure, fine.

3 Q Will you just note that for me, please?

4 A Indeed, I did.

5 Q All right. Now, if you would skip a page and go
6 over to the page which I think says "AM Wednesday" up at the
7 top?

8 A (Perusing document)

9 Q Do you see an "H" and a "J" up at the top of the
10 page?

11 A (Perusing document) No.

12 Q Under No. 98?

13 A (Perusing document) To the left of it?

14 Q Right under --

15 A I think I have the page but I --

16 Q Do you have the page marked at the top "AM
17 Wednesday"?

18 A I believe so. It is slightly cut off, but I think
19 that is what it is. The next to the last page?

20 Q It is not -- no, -- yes, the next to the last page.

21 A I have that page, I don't see the "H" and "J".

22 Here? Number 508?

23 Q Yes.

24 A Okay, if you say so. Yes, I see the line you are
25 referring to, it is next to the line labeled "segment two"?

1 Q Right.

2 A Okay.

3 Q And then would you drop down to Rascal's "Honkey
4 Donkey"? Do you see that?

5 A (Perusing document) Yes, I do.

6 Q All right. Would you drop down next to the last on
7 that page, "H" and "J" again, Number 904?

8 A (Perusing document) That's segment number seven,
9 it says?

10 Q Segment seven, that's right.

11 A Yes.

12 Q Now, on the last page, "H" and "J", Number 549, up
13 at the top of the page?

14 A (Perusing document) Segment number one?

15 Q Right. And then segment number five, "H" and "J"
16 No. 576?

17 A (Perusing document) Yes.

18 Q Would you just note those?

19 A Yes.

20 Q Now, if you would look what has been marked for
21 identification as Exhibit 2B.

22 MR. DUNCAN: This, also, will be sponsored by
23 Witness Smith. And I represent to you, and he will testify,
24 that these are cue sheets obtained from the BMI files.

25 BY MR. DUNCAN:

1 Q All right?

2 A Fine.

3 Q Now, if you would look at the ones that were marked
4 Heckle and Jeckle, toward the very end -- look at the last
5 page, Segment One, Heckle and Jeckle.

6 A (Perusing document)

7 Q I'm sorry, it is "H" and "J".

8 A (Perusing document)

9 Q Do you see that?

10 A Yes.

11 Q What I am trying to establish is that there are
12 four Heckle and Jeckle episodes listed on these sheets that I
13 have given you, 2A, the last two pages?

14 A Yes.

15 Q All right. Now, if you look at the actual cue
16 sheets for the Heckle and Jeckle program, you will see that
17 there is BMI music there?

18 A (Perusing document) So it would appear.

19 Q All right. Would you accept the representation,
20 subject to check, that BMI has all of the music on the Heckle
21 and Jeckle Shows, with the exception of public domain music?

22 A (Perusing document)

23 Q Subject to check.

24 A On these four Heckle and Jeckle shows?

25 Q Yes.

1 A (Perusing document) It certainly looks that way.

2 Q Now, they were, in fact, included in the Tom and
3 Jerry Show, were they not?

4 A If we assume that the "H" and "J" referred to means
5 Heckle and Jeckle, yes.

6 Q All right. And you claim that BMI undercounted
7 music on the Tom and Jerry Show?

8 A That's right.

9 Q All right. And you did a recalculation and
10 recalculated showing what the -- in your view, what the
11 correct percentage for ASCAP should be, is that correct?

12 A We calculated the minutes of BMI and non-BMI for
13 Tom and Jerry. I don't think we calculated percentage just
14 for that show.

15 Q Now, did you have available -- did you give credit
16 to BMT for the Heckle and Jeckle Show?

17 A I would have to check the documents we produced as
18 part of the discovery to tell you. We used BMI's own
19 methodology and constructed an average in the same way that
20 BMT did.

21 Q But according to your testimony, you did not have
22 the cue sheets, you worked from tapes, is that correct?

23 A No, we worked from tapes to identify the episodes
24 broadcast. If we could identify a specific cue sheet, we
25 used it. If we could identify Heckle and Jeckle, 508, we

1 would have used it. If we could only identify Heckle and
2 Jeckle, we used BMT's methodology, we went to the files, we
3 found 13 cue sheets, we calculated the average --

4 Q How did you go about crediting ASCAP and BMI with
5 respect to the Heckle and Jeckle Show?

6 A We would have used cue sheets and determined
7 whether the music on the cue sheets was ASCAP or not ASCAP.

8 Q Well, did you, or did you not use cue sheets?

9 A Yes, we did.

10 Q I understood you to say you used tapes.

11 A No, perhaps --

12 Q Maybe I misunderstood you, Dr. Boyle. I will be
13 pleased to find that out.

14 A Well, I am sorry if I confused you. I certainly
15 didn't mean to.

16 Q On page 3 you say, "ASCAP surveyed tapes that the
17 program made". Are you talking about Tom and Jerry?
18 Different elements, Three Stooges, Little Rascals --

19 A Yes, and if you then go down to the first sentence
20 of the next paragraph, the first full paragraph, "To correct
21 this error, we analyzed the duration of the omitted music by
22 using cue sheets for all the different elements in the Tom
23 and --

24 Q You used --

25 A -- Jerry program.

1 MR. KOENIGSBERG: Mr. Chairman, if Mr. Duncan could
2 allow the witness to finish the answers to his questions, we
3 could be helped.

4 MR. DUNCAN: I'm sorry, sir.

5 MR. KOENIGSBERG: Were you finished?

6 THE WITNESS: Yes, I was.

7 BY MR. DUNCAN:

8 Q Did you use the cue sheets that I have shown you?

9 A I don't know, we used -- if we could identify those
10 particular episodes from our tapes, we would have. If not,
11 we used 13 and constructed an average, just like BMT did.
12 And we produced the cue sheets we used to you, so we could
13 look at those and see. I, frankly, don't recall which 13 cue
14 sheets we used.

15 Q Well, who did this work, do you know?

16 A The cue sheets were pulled by people in our Program
17 Analysis Department. They identified whether the music was
18 ASCAP, or BMT, tallied the minutes and seconds of music.

19 MR. DUNCAN: Could I have your indulgence for a
20 minute?

21 CHAIRMAN ARGETSINGER: Yes.

22 (Off the record)

23 MR. DUNCAN: I would ask that that be marked as
24 Exhibit 2C.

25 (Whereupon, the document was

marked for identification as
BMI Exhibit XR-2C.)

MR. DUNCAN: And I will represent to you, sir, that
these are also cue sheets which were pulled from BMI files.

BY MR. DUNCAN:

Q And I will ask you, do you know whether you used
these cue sheets to analyze the Tom and Jerry Show?

A (Perusing document) I am not sure if I can even
tell which program these are for.

Q Oh, I'm sorry. If you look at the first one it
says "Pinch Singer".

A (Perusing document) Right.

Q And I have identified that earlier on the "rundown
sheet".

A Rascals. That was on the second page -- the first
page after the handwritten cover sheet?

Q Right.

A This is The Little Rascals?

Q Yes, that's right.

A I'm sorry, Mr. Duncan, what was your question?

Q I am just trying to get you to relate the cue sheet
that I have given you to the fact that it is on the "rundown
sheet" just to start with.

A I am with you so far.

Q And I guess my question would be do you know

1 whether you used that cue sheet for that program, or not?

2 A No, I don't. But we can check, we gave you the cue
3 sheets we did use.

4 Q And it is your testimony that in doing your audio
5 survey, your tape survey, you did use cue sheets in order to
6 ascertain which was ASCAP music and which was BMI music, is
7 that correct?

8 A That's right. Let me be clear about it, we had the
9 tapes to identify the type of program elements that were
10 carried, whether or not they were Bugs Bunny cartoons, or Tom
11 and Jerry cartoons, or Little Rascals programs, or the Heckle
12 and Jeckle cartoons, or any of the other ones that were
13 actually carried on Tom and Jerry. Once we did that, if we
14 could from the tape tell the specific cue sheet, if we could
15 say, aha, it is Little Rascals, "Pinch Singer". Then we went
16 to our files and used the cue sheet for Little Rascals "Pinch
17 Singer".

18 If we couldn't do that, we used BMI's methodology,
19 we took an average of 13 cue sheets, we constructed a
20 composite, we determined from those 13 cue sheets the ASCAP
21 music, the BMI music and the other music. And we tallied it
22 accordingly, just like BMI did.

23 Q And can you tell from looking at Exhibit 2C, "Pinch
24 Singer", whether that is ASCAP, or BMI music?

25 A No, I cannot.

1 Q You cannot tell. Okay. Would you go to page 6,
2 please, of your testimony?

3 A (Perusing documents)

4 Q Where you mention GI Joe and Transformers?

5 A (Perusing documents)

6 Q And specifically, Johnny Douglas? Do you have
7 that, sir?

8 A Yes, I do.

9 Q Do you claim that Johnny Douglas writes all of the
10 music for GI Joe and Transformers?

11 A No.

12 Q Do you know what the proportion of that program is,
13 as between ASCAP and BHT?

14 A Not without referring to the underlying documents,
15 no.

16 Q Now, if you would turn to page 7 and page 8, where
17 you refer to Night Tracks.

18 A (Perusing documents)

19 Q Under your Part B, the second full paragraph, you
20 again say you timed the duration of music on tapes?

21 A That's right.

22 Q And may I assume that those are, again, audio
23 tapes?

24 A Yes, they are.

25 MR. DUNCAN: If I could have this marked Exhibit 3

1 for identification.

2 (Whereupon, the document was
3 marked for identification as
4 BMT Exhibit XR-3.)

5 MR. DUNCAN: This, again, will be sponsored by
6 Witness Smith and he will represent and I will represent to
7 you, sir, that these also are cue sheets which were obtained
8 from the station WTBS, and that they show programs which were
9 aired during the composite week, Friday, Saturday and Sunday
10 of our composite week.

11 BY MR. DUNCAN:

12 Q Would you just accept that representation?

13 A Sure. I wish you had used them originally, I
14 wouldn't have had to go through the trouble of timing the
15 tapes.

16 Q All right. And I know you can't tell just by
17 looking at it, but subject to check, would you accept the
18 representation that these cue sheets -- pardon me, these cue
19 sheets show that 42.6 -- approximately 43 percent of the
20 duration of music reflected there is BMT music?

21 A (Perusing document) Perhaps I should take a step
22 back, just to make sure I know what I am looking at. You
23 said these are from your composite week?

24 Q Yes.

25 A And the top page is from the show Power Play? How

1 many pages comprise that show?

2 MR. DUNCAN: Your indulgence, please.

3 (Pause)

4 BY MR. DUNCAN:

5 Q Dr. Boyle, having been helped myself, maybe I can
6 help you with this.

7 A Thank you.

8 Q If you will look at Exhibit 3, the very first page
9 shows Show No. 97.

10 A Right, and it is labeled Power Play.

11 Q That's right, and it is one page long.

12 A Just the first page?

13 Q Yes. And then if you will look at the second page,
14 that is Show No. 200. You can't tell that from that page,
15 but if you will look at the next page you will see up at the
16 top --

17 A No, I am afraid it is cut off. It is cut in half,
18 so I can't tell anything --

19 Q Will you accept my representation -- my copy shows
20 200.

21 A And is that also Power Play, or is that Night
22 Tracks itself?

23 Q That is Night Tracks.

24 A Okay, thank you. And the first page is part of it?

25 Q Yes. And that is one, two, three, four, five, six,

1 seven -- eight pages long, all right?

2 A (Perusing documents) Let's see -- is there a date
3 on that, or anything, Mr. Duncan, to show which date it was
4 carried on?

5 Q 12/18/87.

6 A 12/18/87?

7 Q Yes, over in the right-hand corner.

8 A (Perusing document) Not on mine, but maybe just
9 because of the xerox -- okay -- I'm sorry, I was speaking of
10 Show 200.

11 Q Oh, excuse me, no, I'm sorry, I confused you. My
12 apologies. The date doesn't show on that.

13 A Okay.

14 Q Then if you go over to Show No. 236, Night Tracks.

15 A Yes.

16 Q 12/18/87.

17 A Okay. Is that the rest of all of the pages?

18 Q All but one -- all but the last three pages, I'm
19 sorry.

20 A I'm sorry, I jumped ahead of you. Perhaps you can
21 tell me how many pages there are.

22 Q Well, all but the last page.

23 A (Perusing documents) All right.

24 Q And then the last page is 185, date 12/19.

25 A I can't see the show number, but I --

1 Q That's what it is.

2 A Okay, and that's one page, right?

3 Q Right. Now, those are the four separate sets of
4 cue sheets. I can understand you being confused.

5 A I've got something in here that --

6 Q You can take that out.

7 A Okay.

8 Q Now, the question is would you accept, subject to
9 check, that these cue sheets show on Night Tracks that BMI
10 had approximately 42 to 43 percent of the durational music?
11 Just that simple question.

12 A Subject to check. I certainly have no way to
13 dispute it.

14 Q All right.

15 CHAIRMAN ARGETSINGER: Mr. Duncan, perhaps you
16 could explain the A, B and O's, what do they stand for?

17 MR. DUNCAN: I think I know -- I just want to be
18 sure, Mr. Chairman -- B stands for BMI, A for ASCAP and O
19 stands for "other". I just wanted to check that.

20 THE WITNESS: There are a lot of "other" that look
21 like they are ASCAP to me -- Madonna Song, the Smokey
22 Robinson Song.

23 CHAIRMAN ARGETSINGER: There are many here that
24 don't have a written letter.

25 MR. DUNCAN: Mr. Smith will testify about that and

1 he can be cross-examined on that.

2 BY MR. DUNCAN:

3 Q If you go to page 9, sir, --

4 A Are we done with this?

5 Q Yes.

6 A (Perusing documents)

7 Q In the second line, you testify in your written
8 direct and you also repeat it on your oral direct, with
9 respect to the percentage time, the percentage that you
10 identify as a problem. And you say by doing so, BMI was
11 assuming that the average music duration per hour on film is
12 equal to the average music duration per hour on TV.

13 What do you base your statement as to what BMI's
14 assumption was?

15 A Well, that's the only way the approach makes sense.
16 As you can see from Exhibit 28, if those conditions aren't
17 held, you get very, very different incorrect results. If the
18 numbers happen to come out about the same way it is purely by
19 coincidence. That's the only way that approach will make
20 mathematical sense.

21 Q That's the basis for that statement?

22 A Yes.

23 Q All right. Now, if you would look at Exhibit 28-X.

24 A (Perusing documents)

25 Q On page 2, under the second column, BMI Music Time

1 in Percent, do you see that?

2 A (Perusing document) Yes.

3 Q For WBMT you give, what, zero percent, right?

4 A For the film programming, we have assumed that all
5 the film is ASCAP, that's right.

6 Q And for the WBMT series you give 100 percent?

7 A That's right.

8 Q Now, if I can invite your attention to your Exhibit
9 B-9, which I think you testified this was analogous to?

10 A My Exhibit B-9?

11 Q Oh, I'm sorry, excuse me, BMI Exhibit 9.

12 A Okay. (Perusing documents) From the direct case?

13 Q Yes.

14 A Right.

15 Q Now, I ask you to look at the BMI percents there,
16 in the first column, for all of those stations, TBS, SBK, PIX
17 -- do any of them have zero percent of time?

18 A (Perusing document) No.

19 Q Do any of them have 100 percent?

20 A (Perusing document) No.

21 Q If you increased in Exhibit B-9, the direct case of
22 BMI, the raw time underlying the BMI percents by five, if you
23 increased it five-fold, would it leave the calculation for
24 BMT's share unchanged?

25 A (No response)

1 Q By BMI's share, I mean BMT time in the Nielsen
2 weight?

3 A Let me see if I understand this. If we increased
4 the BMT time, take, for example, WTBS-TV series, by five,
5 then BMI's percentage would change.

6 Q Would change?

7 A In this case. If nothing else changed, if that's
8 the only --

9 Q Whereas in your --

10 A BMI's percentage in the first column, BMI
11 percentage time would change in the circumstance, that's
12 right. But it is really not the factor, it is either zero,
13 or 100, that's the problem.

14 The problem is that they don't necessarily use the
15 same amount of music during an average hour. You could get
16 the same results with 10 percent, or 90 percent. It is the
17 fact that film and TV may use different amounts of music per
18 hour, that's the problem.

19 Q You use zero and 100, don't you?

20 A Sure, it was the clearest way to illustrate it.

21 Q But it is also an extreme way to illustrate it, is
22 it not?

23 A Sure.

24 Q You admit that?

25 A Sure. It is very hard to see the flaw otherwise.

1 It gets confused with a lot of other things. It highlights
2 what the problem is.

3 Q It may be that the illustration introduces the
4 flaw.

5 A No.

6 Q Well, that's a difference of opinion, Dr. Boyle.
7 If you look at the top of your page 10.

8 A (Perusing document)

9 Q Your testimony, page 10, BMI Music in Percent of
10 Time is 100 percent, is that correct?

11 A Column two?

12 Q Column two.

13 A For a TV series, yes.

14 Q Right. And if you look at your Exhibit 28-X, on
15 page 2, again, column two, you have the same 100 percent, do
16 you not?

17 A (Perusing document) That's right.

18 Q At the top of your testimony, page 10, if you were
19 to, in column four -- if you were to change Nielsen time to
20 Nielsen homes, or Nielsen households, would it change the
21 result of your multiplication across?

22 A Only if the division was different from 16.7
23 percent --

24 Q -- the word "time" to home, or households?

25 A And leave the percentages the same?

1 Q Leave everything else the same.

2 A No, it wouldn't.

3 Q It would not?

4 A That's correct.

5 Q Now, look at your Exhibit 35-R.

6 A (Perusing documents)

7 Q On page 1, the last column over Nielsen Hours,
8 Nielsen Household Hours, Viewing Per Quarter Hour, do you see
9 that?

10 A (Perusing document) Yes.

11 Q If you look at the first two lines, WTBS Film and
12 WTBS TV, you have respectively 121,000 and 95,000, roughly,
13 hours, right?

14 A Yes.

15 Q And if you do the mathematics would you accept,
16 subject to check, that those two numbers add up to 55 percent
17 of all of the household viewing per quarter hours in that
18 column? In other words, 121 plus 95 is 216,787, and if you
19 totaled the entire column, you would get 394,302.

20 A I don't think you can add them that way. They are
21 not additive.

22 Q They are not additive?

23 A No, you have a different -- mathematically, they
24 have different denominators, you can't add them. You can't
25 add those numbers that way.

1 Q Well, let me ask you this question then, what
2 percentage of the total number of Nielsen household viewings
3 per quarter hour is represented by TBS film and TBS TV?

4 A (Perusing document) I don't think that expression
5 makes -- has mathematical -- it doesn't make mathematical
6 sense either. You could tell the share of the total hours of
7 household viewing for WTBS compared to others, but you can't
8 convert them on a --

9 Q But you have --

10 A -- convert them on a quarter hour basis --

11 Q -- quarter hour, do you not?

12 A You can't add film per quarter hour and TV per
13 quarter hour to get something else. It is not the total
14 viewing per quarter hour for all programs -- it wouldn't be
15 the sum of those. It doesn't make sense.

16 Q But if you added just the films per quarter hour
17 down the column, would that make sense?

18 A No.

19 Q That wouldn't, either?

20 A No, you can't add any of these numbers up that way.

21 Q And would you explain why that is, please?

22 A What you've got here is total audience for films on
23 WTBS divided by total quarter hours of films on WTBS. You've
24 got a similar number for WSBK, or WWOR. You can't add those
25 numbers. They are not something you can add. It is a result

1 of a division and you can't add that kind of -- you can't do
2 that mathematically.

3 Q All right. Where do the Nielsen household viewing
4 per quarter hour -- what does that figure represent?

5 A The total household viewing divided by the total
6 quarter hours for film and for TV separately for WTBS.

7 Q What does the Nielsen factor add to it?

8 A It is the Nielsen estimate of the average audience
9 for an average quarter hour of film programming on WTBS.

10 Q Is that a measure of how many people are watching
11 the program?

12 A On an average, per quarter hour, that's right.

13 Q And is that a measure of the program's popularity?

14 A Yes, it is.

15 Q Relative popularity?

16 A Yes.

17 Q All right. Now, if you would go to --

18 CHAIRMAN ARGETSINGER: Mr. Duncan, if I could ask a
19 question.

20 MR. DUNCAN: Yes.

21 CHAIRMAN ARGETSINGER: For example, WTBS for
22 121,000 hours and WBMI films at 11,000 are you saying you
23 can't say that WTBS is 10 times greater?

24 THE WITNESS: You can say the total viewing is, or
25 the average per quarter hour. But what I am really saying

1 is, according to Mr. Duncan's formulation, you can't take
2 121,000 for film, plus 95,000 for TV and get some other
3 measure per quarter hour.

4 What you would really have to do is, I guess,
5 multiply each of those by the number of quarter hours, and
6 get the total audience for film, the total audience for
7 series.

8 CHAIRMAN ARGETSINGER: But leaving aside the TV
9 element --

10 THE WITNESS: This certainly would -- well, this
11 would say an average -- films on WTBS, on average, have about
12 10 times the audience as films on WPIX.

13 CHAIRMAN ARGETSINGER: And then if you added the
14 films for WSBK and PIX and WWOR, or WGN, or WRST, you come up
15 with the number of -- I don't know what it is --

16 THE WITNESS: You could compare them relatively to
17 each other. You could say the 121,000 household viewing
18 audience size per quarter hour on WTBS compares to the 7,000
19 on WSBK, that's fine. It shows that WTBS' films are viewed
20 much more extensively as distant signals. But you can't add
21 them in any kind of way like that. You would have to do some
22 other mathematical calculations first. You have to convert
23 it to total audience size and then do the averages
24 afterwards.

25 You could add the total audience for film on WTBS,

1 the total audience for TV series on WTBS, to get the total
2 audience for WTBS and divide that by the total quarter hours
3 --

4 CHAIRMAN ARGETSINGER: But leaving the TV out,
5 could you do it just for films?

6 THE WITNESS: No, you can compare them relative to
7 each other, looking at the magnitude of the audience size,
8 showing which one is bigger. But you can't add them like
9 that, you can't add them in any way and say that between the
10 two there is an average. You can't say there is 132,000 on
11 WTBS, plus WPTX.

12 CHAIRMAN ARGETSINGER: So, you couldn't add WPIX
13 and WSBK and come up with 18,000 and say that that is a
14 certain percentage of what WTBS has?

15 THE WITNESS: No, you couldn't.

16 BY MR. DUNCAN:

17 Q All right, now, if you would stay now on Exhibit
18 35-R, and turn to page 3, if you would?

19 A (Perusing documents)

20 Q In the first column you have almost 39 percent,
21 .38, is that correct?

22 A (Perusing document) That's correct. It is
23 actually BMI's number from their original exhibit B-11.

24 Q But you don't contest that that is Larson weight
25 for that station, do you?

1 A No, that's the Larson weight for that station.

2 Q Right. And is not the Larson weight also -- well,
3 first of all, what does the Larson weight measure?

4 A In this case the share of the fees generated for
5 WTBS as a percentage of the total distant signal carriage.

6 Q And would you agree, or disagree, that the Larson
7 weights are another measure of popularity of programs? The
8 more fees generated --

9 A They are a measure of the carriage of the station
10 on distant signals. They don't distinguish between the
11 popularity of film and series on the stations, or the
12 programming on one station compared to another.

13 Q Just for film on a given station, would it be a
14 measure of popularity, relative to the film on another
15 station?

16 A I don't think so.

17 Q You don't think so?

18 A No.

19 Q What does it measure?

20 A It measures the carriage, the number -- the fees
21 generated by the carriage of that station. They pay the same
22 fees if nobody watched them. They wouldn't be on the cable
23 system for long, I assume, but they pay the same fees, if
24 they had half the audience size.

25 Q All right.

1 CHATMAN ARGETSINGER: Mr. Duncan, would this be a
2 good time to take a break?

3 MR. DUNCAN: Yes.

4 CHATMAN ARGETSINGER: We will take a three or four
5 minute break.

6 (Whereupon, a short recess was taken)

7 BY MR. DUNCAN:

8 Q Going to page 14 of your testimony, Dr. Boyle, at
9 the top you talk about the explosion of educational stations
10 and the harm that it will cause to ASCAP. If you know, in
11 the aggregate, what percent of the total fees generated were
12 produced by those three stations?

13 A I don't recall. It would be in one of the exhibits
14 to my direct case.

15 Q If I suggested to you that the Larson data suggests
16 .22 percent, would that sound about right to you?

17 A I don't remember.

18 Q You don't remember. On page 15, the second full
19 paragraph under Fee, you say "As a matter of standard
20 industry practice, cue sheets are forwarded to ASCAP -- and I
21 presume BMI -- as they are prepared, that is in a
22 chronological order". That is on information and belief, it
23 is not?

24 A Yes.

25 Q As to ASCAP, or as to BMI, or to both?

1 A As to ASCAP, or BMI, I said I presume. I don't
2 believe they are treated any differently than ASCAP.

3 Q I am just trying to find out what's on information
4 and belief --

5 A Both.

6 Q Both of them are. Now, sir, throughout your direct
7 testimony, and again here, you have urged the Tribunal to use
8 the ASCAP distribution system as the basis for allocation. A
9 general question, or two, when did ASCAP computerize its
10 records for purposes of logging music, keeping histories,
11 that type of thing?

12 A I don't know.

13 Q When did you join ASCAP?

14 A I began working for the Society in the middle of
15 1985. I worked for their independent survey firm from 1979
16 through '82, so I had familiarity with ASCAP. So, I guess
17 originally sometime in '79, but I wasn't actually working for
18 the Society then.

19 Q I would assume -- well, not assume -- in 1979, did
20 ASCAP have a computerized data base with respect to its music
21 and other music?

22 A I don't remember.

23 Q If you know, does ASCAP still log music on cards?

24 A No, I believe it is all on computers.

25 Q Do you know when it last logged on cards?

1 A No.

2 Q Is it on computers as to BMI, as well as to ASCAP?

3 A If it is not on computers, it is on cards, or other
4 documents that would be researched when the questions arose,
5 just like would be the case for ASCAP works. They are not
6 created any differently.

7 Q Do I understand from that answer then that some of
8 your data base is on cards, and some of it is in the
9 computer?

10 A (Pause) All the performances that have appeared in
11 our survey are on computer, to the best of my knowledge,
12 whether they are ASCAP, or non-ASCAP.

13 Q That wasn't my question, sir. I am trying to find
14 out simply when you stopped using cards for logging purposes.
15 That's really all I am asking.

16 A I don't remember, but I think -- I believe they
17 have all been converted to computer.

18 Q I thought I understood you to say that some might
19 be on cards, and some might be on computer, and that you
20 would research it in either medium, as the occasion required.
21 Did I mishear you just now?

22 A All the survey performances are on computer now.

23 Q Sir, I understand that. I am still trying to find
24 out whether ASCAP still maintains music data records on
25 cards, as opposed to in the computer?

1 A Music data records is a broader term. There may be
2 information on music that hasn't appeared in our survey--
3 copyright registrations, other information that's on cards.
4 But all the survey performances are on our computer.

5 Q Now, by survey performances, are you referring to
6 your annual distribution survey, or are you referring to the
7 four surveys you presented to this Tribunal?

8 A Anything that is -- any work that has appeared in
9 our survey at any time.

10 Q Which surveys, sir?

11 A The survey that we would conduct on a daily basis
12 from when it began. We tally performances on a daily basis,
13 we analyze tapes on a daily basis. We process cue sheets on
14 a daily basis.

15 Q But my question is simply at one time you used
16 cards for that purpose, did you not?

17 A We may have. It was certainly before my time.

18 Q Is there any doubt in your mind that at one time
19 you used cards and it wasn't in the computer?

20 A No, but it was before my time, as I said.

21 Q All right. You don't know when the changeover
22 occurred?

23 A All I know is all the performances that have
24 appeared in our survey are on our computer now.

25 Q And by "survey" you are referring to the annual

1 survey and not the four ones that were done for here, is that
2 correct?

3 A Oh, I'm sorry, yes. The survey that we do as part
4 of our regular distribution process, yes.

5 Q That is?

6 A Yes.

7 CHAIRMAN ARGETSTINGER: So your annual distribution
8 survey is on computer?

9 THE WITNESS: Yes.

10 CHAIRMAN ARGETSINGER: What about the survey that
11 you presented here?

12 THE WITNESS: All that information would have had
13 to have been added into the computer, if it wasn't already
14 there. And I don't know the extent to which they might have
15 had to add some titles, but I think it was minimal -- but
16 that all had to be added in, so we could do the tallies.

17 BY MR. DUNCAN:

18 Q And those would have -- I just want to understand,
19 those would have been added into the computer from what
20 medium?

21 A If there were works that appeared on the cue sheet
22 that hadn't appeared on our surveys before, and therefore,
23 were not on our data base, they would have gone through our
24 normal procedures, they would have been identified by
25 somebody in our research section to determine the entitled

1 parties, whether they are ASCAP, or not, put on our computer
2 data base from those cue sheets.

3 But I think you are talking about a very, very tiny
4 amount of performances.

5 Q Sir, you say that -- all I am trying to find out--
6 I am not talking about cue sheets now, I am talking about
7 cards, when you stopped logging music information on cards.
8 That's all I am trying to find out. If your answer is you
9 don't know, then that's the answer.

10 A I don't know when we stopped, I know all the works
11 are on the computer now.

12 Q All right. But you did refer to something that may
13 have been put in the computer in connection with the four
14 special surveys that you produced, prepared for this
15 proceeding, did you not just say that?

16 A Yes, I did. There may have been some works that
17 hadn't been logged at all before, so they hadn't been on
18 cards, wouldn't have been on the computer, and there may have
19 been some tiny number that had been added to the computer as
20 part of this exercise.

21 Q And if you know, when did you start tracking BMI
22 music?

23 A From the beginning.

24 Q When you say "from the beginning", do you mean from
25 the time that BMI was formed?

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1 A From the beginning, when we did surveys.

2 Q And when was that?

3 A I don't recall. The current system would be in
4 place sometime in 1958, or '59. The fourth quarter of '59
5 rings a bell, but I may be off by a year, or so on that.

6 Q And when you refer to current system, just so we
7 understand, what are you talking about?

8 A The system specified in the 1960 Order, the final
9 judgment that is attached to, I believe, Exhibit 3 of my
10 original direct case.

11 Q Did that have anything to do with data bases and
12 computers? I am not sure, I am just asking you.

13 A That lays out all the different weights that are
14 given to ASCAP, non-ASCAP works when they are processed for
15 distribution.

16 Q So by "that system" you mean the distribution
17 system as set forth in the Order?

18 A The weights --

19 Q The weighting rules as set forth in your Exhibit 3?

20 A That's right.

21 Q And I am trying to find out when all that became
22 computerized?

23 A I don't recall when it became computerized. I
24 thought you were asking me when we started -- when we began
25 to tally BMT works. We did it from the first day we

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1 instituted that survey -- that whole survey design, that
2 whole weighting system.

3 Q So, that would have been as of -- approximately the
4 date of that Order, as best you recollect?

5 A As best I recollect.

6 Q As best you understand?

7 A That's right, certainly within a year, or so.

8 Q All right.

9 MR. DUNCAN: I have no further questions.

10 CHAIRMAN ARGETSINGER: Mr. Koenigsberg.

11 MR. KOENIGSBERG: Thank you, Mr. Chairman.

12 REDIRECT EXAMINATION

13 BY MR. KOENIGSBERG:

14 Q Dr. Boyle, you talked about Heckle and Jeckle--
15 Dr. Boyle, I am handing you a sheaf of papers which consists
16 of document production that was turned over to BMI in
17 connection with their request for documents regarding the Tom
18 and Jerry corrections.

19 (Handing documents)

20 Can you tell me, Dr. Boyle, if in those corrections
21 you accounted for Heckle and Jeckle programs
22 -- cartoons?

23 A (Perusing documents) Yes, we did. I see at least
24 four instances where Heckle and Jeckle cartoons were
25 identified from our tapes made in 1987.

1 Q And how does the music, if you can describe it
2 generally, or specifically, however you would like -- how
3 does the music in the Heckle and Jeckle cartoons that were
4 part of that correction break down as between BMI and non-
5 BMI music?

6 A (Perusing document) We used the average cue sheet
7 methodology for Heckle and Jeckle that BMI employed, and we
8 tallied 63 seconds of ASCAP music for each episode, 233
9 seconds of BMI music for each episode and 70 seconds of TV
10 music for each episode, based on the average of the 13 cue
11 sheets.

12 CHAIRMAN ARGETSINGER: What document are you
13 referring to? Is this something that has been entered?

14 MR. KOENIGSBERG: It is not been entered into
15 evidence. It is something that was exchanged with the other
16 side and I didn't propose to enter it into evidence, Mr.
17 Chairman. It is just to refresh Dr. Boyle's recollection.

18 CHAIRMAN ARGETSINGER: That's all right. We don't
19 need it. I just thought maybe we had it here.

20 MR. KOENIGSBERG: No, sir.

21 THE WITNESS: We used an average and we credited,
22 as I said, 63 seconds of ASCAP music, 233 seconds of BMI
23 music and 70 seconds of TV, on average, based on the cue
24 sheet methodology being used.

25 BY MR. KOENIGSBERG:

1 Q Would it be fair to say that most of the music in
2 the Heckle and Jeckle cartoons is BMI music?

3 A Yes.

4 Q And you credited BMT with every second of that
5 music?

6 A Yes.

7 Q Now, do you have Exhibit 2B, BMI Exhibit XR-2B in
8 front of you?

9 A (Perusing documents) Yes, I do.

10 Q If you take a look at the four cue sheets that BMI
11 has given you here -- I believe that Mr. Duncan can correct
12 me, if I am wrong, I believe Mr. Duncan represented that
13 these were not cue sheets of cartoons -- these were not
14 cartoons that appeared during the composite week. They appear
15 sometime close to the composite week, but not during the
16 composite week.

17 MR. DUNCAN: I don't remember saying that. I
18 remember saying --

19 MR. KOENIGSBERG: On Heckle and Jeckle, I think you
20 said sometime close to that composite week.

21 MR. DUNCAN: If I said that I intended to say
22 during.

23 MR. KOENIGSBERG: Okay.

24 MR. KOENIGSBERG: You did represent -- let me ask
25 you this, Mr. Duncan, so I can be clear on my questions to

1 Dr. Boyle -- you did represent that this was information that
2 has come in to BMI after it did its tally. It just came in?

3 MR. DUNCAN: That is correct.

4 MR. KOENIGSBERG: Okay.

5 BY MR. KOENIGSBERG:

6 Q So, Dr. Boyle, if BMI did not know the particular
7 Heckle and Jeckle cartoons that were performed during the
8 composite week on the Tom and Jerry Show, but BMI had done
9 its durational survey, so that it made up an average cue
10 sheet of Heckle and Jeckle cartoons -- if you would take a
11 look at the four cue sheets that appear in BMT Exhibit XR-2B,
12 based on your knowledge of what BMT did, would these four cue
13 sheets have appeared in the average cue sheet that BMI used?

14 A (Perusing document) I doubt it. When we looked at
15 all the average cue sheets for the different shows that they
16 gave us, they were virtually all in alphabetical order, some
17 were in chronological order, but they were date-specific.
18 And I, frankly, wouldn't have expected to see the Rainmakers,
19 or Messed Up Moviemakers in the first 13 in their files.
20 They didn't get that far along the alphabet. They may have
21 gotten Blind Date.

22 Q Mr. Duncan asked you some questions about the GI
23 Joe or the Transformers music. As I recall, he asked you if
24 there was other music in those cartoons, other than the music
25 written by Johnny Douglas, the PRS member about whom you

1 testified.

2 Do you recall that?

3 A Yes.

4 Q Now, when you made your correction for GI Joe and
5 the Transformers, did you correct for the misallocation of
6 the Johnny Douglas music?

7 A Yes, we did.

8 Q Did you leave in BMI's crediting for the other BMI
9 music that might have appeared in GI Joe and the
10 Transformers?

11 A Yes.

12 Q So, that was the only change you made then in GI
13 Joe and the Transformers, was to switch the Johnny Douglas
14 music from the BMI column where it did not belong, to the
15 ASCAP column where it did belong, is that correct?

16 A Yes.

17 MR. KOENIGSBERG: Mr. Chairman, may I have just one
18 moment?

19 CHAIRMAN ARGETSTINGER: Yes.

20 (Pause)

21 BY MR. KOENIGSBERG:

22 Q Dr. Boyle, Mr. Duncan asked you some questions
23 about the -- what we will call the "percentage methodological
24 flow" and the use of Nielsen time as opposed to Nielsen
25 audience. Do you recall that line of questions?

1 A Yes, I do.

2 Q Dr. Boyle, if you know, if you corrected the
3 tallying of music on cue sheets and other items -- you
4 corrected the tallying of music by BMI, but did not correct
5 for the percentage methodological flaw and did not correct
6 for the use of Nielsen time, as opposed to Nielsen audience?

7 In other words, if all you did to BMI's methodology
8 was to add on music that they did not add, or to correct the
9 misallocation of music duration, and that was all you did, do
10 you know what share BMI would have of the total?

11 A In that case, where just the errors like Night
12 Tracks and Tom and Jerry were corrected, BMI's share would
13 have been 41 percent, non-BMI music would have been 59
14 percent.

15 Q And, Dr. Boyle, Mr. Duncan introduced some exhibits
16 which he represented showed that BMI's share of the music on
17 Night Tracks was approximately 42 percent of the music
18 duration. I want you to assume, Dr. Boyle, that BMI had 45
19 percent of the music duration on Night Tracks. if that were
20 the case, and you modified Exhibit 35-R accordingly, so as to
21 credit 45 percent of the total Night Tracks music duration to
22 BMI, and 55 percent to "other", more than Mr. Duncan
23 represented, what would BMI's share on the bottom line of
24 Exhibit 35-R be?

25 A BMI's share would have increased to 35. --

1 CHAIRMAN ARGETSINGER: Just a minute --

2 BY MR. KOENIGSBERG:

3 Q Let me repeat the question, if that would help.

4 Dr. Boyle, again, Mr. Duncan represented to you
5 that BMT examined cue sheets for Night Tracks and came to a
6 number of about 42 percent for BMT. If, instead of using 42
7 percent for BMT, you used 45 percent for BMT, more than Mr.
8 Duncan says was included, and you modified Exhibit 35-R so
9 that the Night Tracks music, the duration of Night Tracks'
10 music was split between BMT and "other", with a ratio of 45
11 to 55 percent, what then would BMT's share of the bottom line
12 of Exhibit 35-R be?

13 A If you made that assumption, BMI's share would
14 increase by two percentage points. It would be 35.7 percent
15 of the total. And the non-BMI share then would be 64.3
16 percent of the total. And it would certainly be a lot closer
17 to the two-thirds/one-third split from our direct case than
18 the 50-50 split from BMI's direct case.

19 MR. KOENIGSBERG: Mr. Chairman, I have nothing
20 further for Dr. Boyle.

21 CHAIRMAN ARGETSINGER: I want to thank you very
22 much.

23 THE WITNESS: Thank you.

24 (Whereupon, the witness was excused)

25 CHAIRMAN ARGETSINGER: We will be here then at 9:30

1 tomorrow. We will take a brief lunch and we will try to get
2 through.

3 MR. KOENIGSBERG: Thank you, Mr. Chairman.

4 (Whereupon, at 3:40 p.m., the proceedings were
5 adjourned, to reconvene at 9:30 a.m., Friday, January 19,
6 1990.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

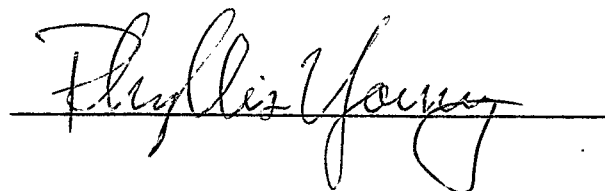
In the matter of: Cable Copyright Royalty Distribution Proceedings -
Phase II,
Docket No. CRT 89-2-87CD

Before: Copyright Royalty Tribunal

Date: January 18, 1990

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to type-
writing.

A handwritten signature in cursive script, appearing to read "Phyllis Young", is written over a horizontal line.